Supreme Court, U.S.
FILED
MAY 17 2010
OFFICE OF THE CLERK

No. 09- 091407

IN THE

Supreme Court of the United States

CURTIS JONES,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

ALAN J. TAUBER
LEVANT, MARTIN & TAUBER, P.C.
320 North 18th Street
Philadelphia, PA 19103
(215) 564-5959
atauber@lmtpc.com

Attorneys for Petitioner

229819

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the police search of petitioner's dormitory residence violated his right to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution where the search warrant application lacked probable cause?

PARTIES TO THE PROCEEDINGS

This case was initiated by the respondent Commonwealth of Pennsylvania when it filed a complaint against petitioner Curtis Jones for the murder of Abdul Sesay. Petitioner Jones was convicted of first degree murder and appealed that conviction to the Pennsylvania Superior Court which reversed the trial court judgment. The Commonwealth then became the petitioner in its petition for allocator in the Pennsylvania Supreme Court which reversed the Superior Court judgment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	6
I. Because A Standard Requiring Appellate Courts To "Defer" To Magistrates Undercuts The Fourth Amendment, This Court Should Articulate A Clear And Rigorous Standard To Be Applied For Appellate Courts To Employ When Reviewing Warrants Issued By Magistrates Upon A Police Affidavit	6

Contents

Page

A. Because this Court's "totality of the circumstances," "great deference," and "substantial basis" approach has led to confusion and disunity among state and federal courts, this Court should announce a clear, rigorous standard by which reviewing courts should test the validity of an affidavit and warrant 7

B. This Court should adopt a *de novo* standard of review in accordance with leading academic analysis and time-honored legal principles endorsed by this Court 16

C. If not *de novo*, this Court should articulate an intermediate approach, as the confusion and disparity caused *Gates* has led to an unconstitutionally excessive deference to magistrate decisions. 24

D. Whatever standard the Court adopts here, the confusion that reigned in the Pennsylvania Supreme Court requires that Mr. Jones' appeal be remanded. 31

Contents

Page

II. Even Under A Standard Of "Great Deference," The Court Below Wrongly Found That There Was Probable Cause For The Search Warrant To Issue 32

CONCLUSION 35

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Pennsylvania, Middle District Decided February 16, 2010 ..... 1a

Appendix B — Concurring Opinion Of The Supreme Court Of Pennsylvania, Middle District Decided February 16, 2010 ..... 23a

Appendix C — Concurring Opinion Of The Supreme Court Of Pennsylvania, Middle District Decided February 16, 2010 ..... 30a

Appendix D — Opinion Of The Superior Court Of Pennsylvania Filed June 14, 2007 ..... 47a

Appendix E — Opinion Of The Court Of Common Pleas For Delaware County, Pennsylvania, Criminal Division Dated June 8, 2004 ..... 62a

TABLE OF CITED AUTHORITIES

Page

Cases:

Brinegar v. U.S.,
338 U.S. 160 (1949) 25

Commonwealth v. Bomar,
573 Pa. 426, 826 A.2d 831 (2003) 14

Commonwealth v. Jones,
988 A.2d 649 (Pa. 2010) 9, 13, 14, 15

Houser v. State,
678 N.E.2d 95 (Ind. 1997) 12-13

Illinois v. Gates,
462 U.S. 213 (1983) ..... *passim*

Johnson v. United States,
333 U.S. 10 (1948) 26

Jones v. United States,
362 U.S. 257, 80 S. Ct. 725 (1960) 8, 9, 27

Miller v. Fenton,
474 U.S. 104, 106 S.Ct. 445,
88 L.Ed.2d 405 (1985) 18

Ornelas v. United States,
517 U.S. 690 (1996) ..... *passim*

Cited Authorities

Page

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 17

Sandler v. All Acquisition Corp.,
954 F.2d 382 (6th Cir. 1992) 17

State v. Diaz,
226 Conn. 514 (1993) 13

United States v. Beckett,
321 F.3d 26 (1st Cir. 2003) 17

United States v. Caggiano,
899 F.2d 99 (1st Cir. 1990) 12

United States v. Celestine,
324 F.3d 1095 (9th Cir. 2003) 17

U.S. v. Dahlman,
13 F.3d 1391 (10th Cir. 1993) 11

United States v. Duegaw,
150 F. App'x. 803 (10th Cir. 2005) 12

United States v. Ford,
34 F.3d 992 (11th Cir. 1994) 17

United States v. Foree,
43 F.3d 1572 (11th Cir. 1995) 12

Cited Authorities

Page

United States v. Francis,
327 F.3d 729 (8th Cir. 2003) 16

United States v. Galloway,
316 F.3d 624 (6th Cir. 2003) 17

United States v. Gibson,
55 F.3d 173 (5th Cir. 1995) 12

United States v. Harlan,
35 F.3d 176 (5th Cir. 1994) 17

U.S. v. Jones,
994 F.2d 1051 (3d Cir. 1993) 12

United States v. Leake,
998 F.2d 1359 (6th Cir. 1993) 12, 28

United States v. Leon,
468 U.S. 897 (1984) ..... *passim*

United States v. Long,
11 F. App'x. 106 (4th Cir. 2001) 12

United States v. Mattison,
153 F.3d 406 (7th Cir. 1998) 17

United States v. McKinney,
919 F.2d 405 (7th Cir. 1990) 19, 20

Cited Authorities

Page

United States v. McQuisten,
795 F.2d 858 (9th Cir. 1986) 10-11

United States v. Nocella,
849 F.2d 33 (1st Cir. 1998) 12

United States v. Ritter,
416 F.3d 256 (3d Cir. 2005) 12

United States v. Rodriguez,
976 F.2d 592 (9th Cir. 1992) 17

United States v. Rodriguez-Suazo,
346 F.3d 637 (6th Cir. 2003) 12

United States v. Smith,
30 F.3d 568 (4th Cir. 1994) 17

United States v. Smith, 12
783 F.2d 648 (6th Cir. 1986) 12

United States v. Spears,
965 F.2d 262 (7th Cir. 1992) 10, 11

United States v. Valdez Hocker,
333 F.3d 1206 (10th Cir. 2003) 16

United States v. Ventresca,
380 U.S. 102 (1965) 30

Cited Authorities

Page

United States v. Wagner,
989 F.2d 69 (2d Cir. 1993) 12

United States v. Warren,
42 F.3d 647 (D.C. Cir. 1994) 12

United States v. Wesley,
293 F.3d 541 (D.C. Cir. 2002) 17

United States v. Wilhelm,
80 F.3d 116 (4th Cir. 1996) 27, 30

United States v. Williams,
3 F.3d 69 (3d Cir. 1993) 17

U.S. v. Williamson,
1 F.3d 1134 (10th Cir. 1993) 11

United States v. Wright,
145 F.3d 972 (8th Cir. 1998) 10

Page

Other Authorities:

Drey Cooley, *Clearly Erroneous Review is Clearly Erroneous: Reinterpreting Illinois v. Gates and Advocating De Novo Review for a Magistrate's Determination of Probable Cause in Applications for Search Warrants*, 55 Drake L. Rev. 85 (2006) ..... *passim*

Jeffrey M. Grybowski, Note, *The Appellate Role in Ensuring Justice in Fourth Amendment Controversies: Ornelas v. United States*, 75 N.C. L. REV. 1819 (1997) 22, 25

6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 455 (4TH Edition 2004) ..... *passim*

O'Neill, Standards of Review in Illinois Criminal Cases: The Need for Major Reform, 17 So.Ill.U.L.J. 51 (1992) 6

Petitioner Curtis Jones respectfully petitions for a writ of certiorari to review the judgment of the Pennsylvania Supreme Court. The decision of the Pennsylvania Supreme Court (Reporter No.: 989 A.2d 649) is reprinted at App. 1a-22a. The decision of the Pennsylvania Superior Court (928 A.2d 1054) is reprinted at App. at 23a-46a. The Delaware County Court of Common Pleas' decision in this case is reprinted at App. 62a-68a and is unpublished.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on February 16, 2010. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On April 15, 2002, police officers responded to a report of gunfire occurring on the campus of Widener University and discovered the body of Abdul Sesay, a twenty year old student who had been shot and killed. App. at 2a-3a. The victim resided in a Widener University dormitory which he shared with his roommate, Curtis Jones, petitioner in this case. App. at 3a.

Shortly after police discovered the body of Mr. Sesay, they applied for and received a search warrant for the joint residence of petitioner and Mr. Sesay. App. At 3a-4a The affidavit supporting the application for the warrant stated as follows:

> On 2/19/01 Officer Gizzi responded to the 100 block of East 18th Street for a call of shots fired. Upon arrival, the officer was advised by witnesses that the shots were coming from the end of the street. Officer Gizzi then went to the end of the street and discovered a b/m wearing a black shirt and blue jean shorts laying on his back in a pool of blood with what appeared to be a gunshot wound to the head, the victim was unresponsive and not breathing. Paramedics pronounced the victim deceased at 0216 hrs.
>
> Det. Hampel discovered keys on the victim's body that belonged to Widener University. Upon checking with Widener security, it was found that the victim may have been a Widener student, picture was given to police by Widener security. It was compared to the victim that was discovered on the 1000 blk of East 18 Street, and found that the victim and the picture provided the police were identical.
>
> With the information provided, police believe that the victim is Abdul Sesay b/m/20 who

> resides Widener University campus at Thayer Hall room 306.[1]

App at 3a-4a.

The application for the warrant sought the right to search petitioner's dorm room for "any evidence that provides identification, cellular phones, pagers, drugs, drug paraphernalia, handguns, bullets." App at 4a. When the warrant issued, police searched the dorm room and recovered a cell phone, a Glock handgun, a cell phone book, and sales paperwork which was in the victim's name, two white t-shirts, and jean shorts. App at 4a-5a. An officer involved in the search testified that the cellphone contained what appeared to be blood. App at 5a. It was later determined that the victim's blood appeared on the cellphone, one of the t-shirts, which belonged to petitioner, and a pair of shorts, which also belonged to petitioner. App at 5a. The cellphone belonged to the victim. App at 5a.

Petitioner filed pretrial motions to suppress evidence seized pursuant to the search warrant alleging that the warrant application failed to possess adequate probable cause to justify issuance of the warrant. App. at 7a-8a. The trial court denied petitioner's motion, and

---

1. The affidavit of probable cause set forth an incorrect investigation date, an error described as caused by a hasty cut-and-paste procedure. The suppression court, the Pennsylvania Superior Court and the Pennsylvania Supreme Court determined that this technical mistake had no impact on the validity of the search warrant and it is not raised as an issue in this petition.

the evidence was admitted at his trial. App. at 7a, and 62a. Petitioner was ultimately convicted of first-degree murder and was sentenced to imprisonment for life without the possibility of parole, as required by Pennsylvania law, as well as a consecutive 66-132 months incarceration. App. at 7a-8a. Petitioner filed a direct appeal to Pennsylvania Superior Court alleging that the trial court erred in denying his motion to suppress physical evidence. App. at 8a-9a. A unanimous three judge panel of the Superior Court found that the trial court erred in denying petitioner's motion to suppress. App. at 47a-61a. The Court found that the application of the search warrant lacked facts necessary to establish probable cause to justify the search. App. at 57a-58a. The Superior Court found that

> . . . the affidavit contains no explanation as to why police would expect to find the evidence listed in the warrant in the victim's dormitory room. Nothing in the affidavit states that the victim's death was drug-related, yet some of the evidence sought clearly is so related. Because the affidavit gives no indication that contraband or evidence of crime will be found in the victim's dorm room blocks away from the crime scene, is not supported by probable cause.
>
> Moreover, although identification evidence belonging to Abdul Sesay would arguably logically be found in his room, it is clear from the warrant that the police had already identified the victim as Abdul Sesay, thus there was no reason to search for additional

> identification evidence, certainly there was no stated reason. As such, there is no probable cause to support the issuance of the search warrant for identification purposes.

App. at 58a.

The Superior Court vacated the judgment and remanded the case for a new trial without the evidence seized from petitioner's dorm room. App. at 61a.

The Pennsylvania Supreme Court reversed and reinstated the trial court judgment. In its opinion, the majority cited to the decision of this Court in *United States v. Leon*, 468 U.S. 897 (1984) that "great deference should be given to the magistrate's determination." In its opinion, the Pennsylvania Supreme Court fails to acknowledge or justify the near complete omission of any factual basis for why police sought or needed to search petitioner's dorm room for the evidence sought. Uncertainty over what is meant by the need to defer to a magistrate's decision is made manifest by the Pennsylvania Supreme Court's bald acceptance of the purported need to search petitioner's residence without any stated justification or factual explanation of why the police expected to find such evidence there and how it would be connected to the murder.

REASONS FOR GRANTING THE PETITION

I. Because A Standard Requiring Appellate Courts To "Defer" To Magistrates Undercuts The Fourth Amendment, This Court Should Articulate A Clear And Rigorous Standard To Be Applied For Appellate Courts To Employ When Reviewing Warrants Issued By Magistrates Upon A Police Affidavit

The responsibility of courts to ensure the constitutional rights of our citizens involves, in no small part, the duty of appellate courts to review the issues resolved below, assuring for criminal defendants in particular, a fair and just adjudication. The establishment of a standard of review to be applied in a given situation involves "the crucial question of how power is allocated among the decisionmakers in the criminal system." O'Neill, Standards of Review in Illinois Criminal Cases: The Need for Major Reform, 17 So.Ill.U.L.J. 51, 54 (1992). Specific to these purposes is the review of the magistrate's determination of probable cause based on a police affidavit, evoking questions of how courts assure that Fourth Amendment rights are applied and interpreted. "That allocation is of considerable importance, for it has much to do with the real-life meaning of those rights, and as well with the fairness and efficiency of the appellate process." 6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 455 (4TH Edition 2004). Specific to the matter before the Court is the manner by which appellate courts should review a magistrate's affidavit based determination of probable cause which revokes questions of how courts assure that Fourth Amendment rights are applied and interpreted.

Here, petitioner Curtis Jones, upon the rightful appeal of his murder conviction, was deprived relief for a violation of his Fourth Amendment rights to be free from unreasonable search and seizure due to uncertainty in the applicable standard of review. While precedent from this Court and others, as well as solid legal principles and policy, indicate that a *de novo* or intermediate standard of review was most appropriate in this case, confusion in the interpretation of this Court's seminal cases led the court below to apply a far too deferential standard in Pennsylvania, much like the "clear error" review wrongly invoked in other courts. This deferential standard of a magistrate's decision, which is based solely upon the papers in front of him, and requires no evaluation of witness credibility, diluted the serious level of review to which petition Jones was entitled. This Court should adopt a more stringent and precise standard of review, and remand the case so that Mr. Jones might have his appeal heard under a fair and clear new Supreme Court holding.

A. Because this Court's "totality of the circumstances," "great deference," and "substantial basis" approach has led to confusion and disunity among state and federal courts, this Court should announce a clear, rigorous standard by which reviewing courts should test the validity of an affidavit and warrant.

As Professor LaFave, the nation's leading authority on search and seizure law has declared, since this Court's decision in *Illinois v. Gates*, 462 U.S. 213 (1983), federal and state courts have varied widely on how to apply this

Court's standard of review of a magistrate's decision to grant a warrant. *LaFave, supra.* In *Gates*, the Court found that

> the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. *Jones v. United States*, 362 U.S.257, 271, 80 S.Ct.725, 736. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*..

462 U.S. at 238-239.

The interpretations of the "substantial basis" standard have created confusion that has resulted in the kind of unconstitutional inconsistency applied in this case. *Id.* Indeed, in the case at bar, the Pennsylvania Supreme Court declared it would review the magistrate's determination in a "plenary" fashion, but

then gave "deference" (with various degrees and adjectives) to the magistrate. *Commonwealth v. Jones*, 988 A.2d 649, 654 (Pa., 2010).

The standard of review as pronounced in *Gates* has led to drastic differences in interpation and must be clarified in order to establish appellate authority. Drey Cooley, *Clearly Erroneous Review is Clearly Erroneous: Reinterpreting Illinois v. Gates and Advocating De Novo Review for a Magistrate's Determination of Probable Cause in Applications for Search Warrants*, 55 Drake L. Rev. 85, 96-97 (2006). While *Gates* established that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates* at 238-39 (quoting *Jones v. United States*, 362 U.S. at 271), the standard for reviewing those determinations of substantial basis is unclear.[2] Because *Gates* went on to claim this created a "flexible, easily

2. At first glance, the instructions to reviewing courts from *Gates* seem straightforward . . . However, much confusion exists among circuits regarding what exactly this pronouncement means. Surprisingly, this confusion has not produced extensive debate within appellate opinions or scholarly journals. Instead, different circuits merely pronounce their interpretation with little justification, explanation, or detail. Nonetheless, it is evident from these various circuit pronouncements that the established standard in *Gates* is much more ambiguous than one might have originally thought.

Cooley at 96-97.

applied standard [that] will better achieve the accommodation of public and private interests that the Fourth Amendment requires," *id.* at 239, federal and state courts have varied widely in their interpretation, leading one observer to note:

> [u]pon closer inspection, the *Gates* pronouncement is extremely confusing. Does it leave the door open for circuits to utilize their own standard of review in determining whether the magistrate had a substantial basis for finding probable cause? Does it establish an intermediate standard of review? Or, does the requirement of great deference definitively necessitate clear error review? If clear error review was what the Court intended, why did they not simply and specifically express this intention? Why did they choose this ambiguous language for probable cause determinations? The internal confusion over the ambiguous substantial basis statement in Gates has resulted in a number of different circuit interpretations."

Cooley at 96-97.

Those interpretations range from the deferential to the intermediate to close to *de novo*. LaFave, *supra*. First, three circuits have interpreted *Gates* to call for review only for clear error, deferring significantly to magistrate determinations of probably cause. *United States v. Spears*, 965 F.2d 262, 271 (7th Cir. 1992); *United States v. Wright*, 145 F.3d 972, 975 (8th Cir. 1998); and *United States v. McQuisten*, 795 F.2d 858, 861 (9th Cir.

1986). In *Spears*, the 7th Circuit held that *Gates*' "substantial basis" referred only to the magistrate's determination and not to the review of that determination. *Spears* at 270. Therefore, the 7th Circuit read *Gates* as permitting "a court to utilize whatever standard of review it wants as long as it gives great deference to a magistrate's determination when analyzing whether the magistrate had a substantial basis for issuing the search warrant." *Cooley* at 98 (citing *Spears* at 270).

Another circuit, reviewing warrant sufficiency, reviewed that determination *de novo*. *U.S. v. Williamson*, 1 F.3d 1134, 1135 (10th Cir. , 1993). While not citing to *Gates*, the 10th Circuit held that the determination of whether the "warrant at issue is sufficiently particular," is a legal question to be reviewed *de novo*. *Id*. *See also U.S. v. Dahlman*, 13 F.3d 1391, 1394 (10th Cir. , 1993) ("Our standard of review for the denial of a motion to suppress is to accept the trial court's findings of fact unless clearly erroneous and to view the evidence in the light most favorable to the government. However, the determination of the sufficiency of a warrant under the Fourth Amendment is a conclusion of law we review *de novo*.").

Additionally, many circuits interpret *Gates* with even less certainty—holding that this Court has either established an intermediate standard of review known as "substantial basis" or failed altogether to enunciate a standard to review whether magistrates had substantial basis to determine probable cause. LaFave, *supra*. For example, the 6th Circuit emphasized that a warrant probable cause question constitutes a question

of law—as opposed to a warrantless determination—and therefore required an application of plenary review to a lower court's finding of law. *United States v. Leake*, 998 F.2d 1359, 1362 (6th Cir. , 1993). There, "the court chose not to utilize the clear error language it had previously highlighted and chose instead to favor the lighter substantial basis language emphasized in *Gates*." Cooley at 99-100.[3]

Finally, the confusion under the *Gates* standard has plagued states as well. *Houser v. State*, 678 N.E.2d 95

3. *See also United States v. Nocella*, 849 F.2d 33, 39 (1st Cir. 1998) ("What matters, in the long run, is whether the issuing magistrate had a 'substantial basis' for finding that probable cause was extant." (quoting *Gates* at 238-39)); *United States v. Caggiano*, 899 F.2d 99, 102 (1st Cir. 1990); *United States v. Wagner*, 989 F.2d 69, 72 (2d Cir. 1993) ("The reviewing court's determination should be limited to whether the issuing judicial officer had a substantial basis for the finding of probable cause."); *United States v. Ritter*, 416 F.3d 256, 264 (3d Cir. 2005) (defer even if the reviewing court "might reach a different result" upon de novo review); *US v. Jones*, 994 F.2d 1051 (3d Cir 1993) (defer to magistrate's decision in "doubtful or marginal cases"); *United States v. Long*, 11 F. App'x. 106, 107 (4th Cir. 2001) ("Our inquiry is limited to whether there was a substantial basis for the magistrate judge's conclusion that probable cause existed."); *United States v. Gibson*, 55 F.3d 173, 177 (5th Cir. 1995) ("Without question, there was a substantial basis on the face of the affidavit for [the judge's] determination that probable cause existed for the issuance of a search warrant. . . ."); *United States v. Rodriguez Suazo*, 346 F.3d 637, 643 (6th Cir. 2003); *United States v. Leake*, 998 F.2d 1359, 1363 (6th Cir. 1993); *United States v. Smith*, 783 F.2d 648, 653 (6th Cir. 1986); *United States v. Duegaw*, 150 F. App'x. 803, 805 (10th Cir. 2005); *United States v. Foree*, 43 F.3d 1572, 1576 (11th Cir. 1995); *United States v. Warren*, 42 F.3d 647, 652 (D.C. Cir. 1994).

(Ind. 1997). The Indiana Supreme Court declared that the "degree of deference" as required by this Court is unclear. *Id.* The Indiana Supreme Court referred to substantial basis as an intermediary standard of appellate review, holding that it "requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination." *Id.* at 99. In upholding a magistrate's issuance of a warrant, the court refused to apply a clear error standard, holding that *Gates* requires only that "doubtful cases are to be resolved in favor of upholding the warrant." *Id.* at 98. Furthermore, the court interpreted that "*Gates* itself chose "substantial basis," which suggests something less deferential than abuse of discretion. Moreover, abuse of discretion is a widely used term that, if intended by *Gates*, would presumably have been adopted explicitly. *Id.* at 99.[4]

Here, the effect of the confusion seen above cannot be ignored. The Pennsylvania Supreme Court in *Commonwealth v. Jones* appeared confused in its

4. *See also State v. Diaz*, 226 Conn. 514, 537 (1993) ("the reviewing court must give deference to . . . all reasonable inferences drawn by the issuing judge, and then decide whether, based upon the facts explicitly stated in the affidavit, supplemented by those reasonable inferences, the affidavit establishes probable cause."). In establishing the lack of certainty among state courts, LaFave reads Diaz as establishing "a lesser deference than practicalities make essential as to a suppression hearing judge's decision after hearing conflicting testimony." Wayne R. LaFave, Search And Seizure: A Treatise On The Fourth Amendment, 6 Search & Seizure § 11.7 (4th ed.).

reading of the amount of deference, if any, required by *Gates*. The court began by noting that it must accept the factual findings and reverse "only if the court's legal conclusions are erroneous." *Jones* at 653 (Citing *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831, 842 (2003)):

> [w]here, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, "whose duty it is to determine if the suppression court properly applied the law to the facts." Thus, the conclusions of law of the courts below are subject to our plenary review.

Jones at 654.

The court, however, went on to repeatedly refer to its obligation to "deference," quoting *Gates* and *Leon*, along with Pennsylvania precedent, to support its ultimate decision to uphold the validity of the warrant. *Jones* at 655-56. The confusion, amounting to a misuse of precedent, is particularly evident in light of a concurring opinion, which agrees with the majority's result but takes issue with its reading of *Gates* and state precedent in light of established legal principles and practicality. Pennsylvania Chief Justice Castillo, concurring, stated that

> If the deference is intended to extend to the assessment of probable cause in warrant affidavit review, where no fact-finding or

> credibility determination within the special bailiwick of the magistrate is involved, it is indeed difficult to understand why any measure of "deference" should apply at all. When the question is a purely legal one (such as the question of whether an agreed-upon set of facts and circumstances establishes probable cause), there is no jurisprudential reason for a reviewing court to defer to the judgment of any entity below: whether it be the trial judge, a magistrate, or a police officer in the field.

Id. at 660. Chief Justice Castille further recognized "the tension in this area, and the concomitant inconsistencies of expression in the caselaw," and attributed them to, among other things, the *Gates* emphasis on "a practical, and not a hypertechnical," approach to reviewing magistrate determinations. *Id.* In a separate concurring opinion, Justice Todd elaborated that "no matter how it has been characterized-as ordinary deference, due deference, substantial deference, or great deference-appellate review of the magistrate's legal determination of probable cause, as with appellate review of all legal questions, remains plenary." *Id.* at 664.

Therefore, the division and uncertainty appearing throughout American courts was evident in the Pennsylvania Supreme Court in this case, by which it first announced it would assess the validity of the warrant in a "plenary" fashion, and then applied what was apparently a "deferential" standard. This demonstrates the need for a clear standard from this Court in assessing Fourth Amendment claims. This Court

should settle the confusion apparent in circuits and states by expressly prohibiting clear error review of magistrate decisions and selecting *de novo* review or at least define a much less deferential intermediate standard.

B. This Court should adopt a *de novo* standard of review in accordance with leading academic analysis and time-honored legal principles endorsed by this Court.

While acknowledging this Court's declaration in *Gates* "that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review," *Gates* at 236, appellant argues that existing legal principles, subsequent Supreme Court and circuit court precedent, and leading academic authorities support his contention that *de novo* is in fact the appropriate standard of review for appellate courts considering the sufficiency of affidavits seeking warrants.

First, basic notions of review dictate that questions of law should be reviewed *de novo*, as opposed to questions of fact, which are usually reviewed for clear error only. LaFave, *supra*. Determinations of law made by trial courts are not entitled to deference. *Id.* The prevailing sentiment among federal courts is that legal determinations, particularly in the Fourth Amendment context, are to be subjected to "*de novo*" review. *Id.*[5]

5. *See United States v. Valdez Hocker*, 333 F.3d 1206 (10th Cir. 2003); *United States v. Francis*, 327 F.3d 729 (8th Cir. 2003); (Cont'd)

Mixed questions of law and fact are also treated *de novo*. *United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992) ("As a mixed question of law and fact, we review *de novo* whether reasonable suspicion existed for this investigatory stop."); *see also Sandler v. All Acquisition Corp.*, 954 F.2d 382, 385 (6th Cir. 1992). A magistrate's determination of probable cause constitutes such a mixed question. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). This Court has established that *de novo* review is appropriate when

> [t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Id. at 696-97 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n. 19, (1982)).

While *Ornelas* pertained to appellate review of a warrantless probable cause determination, the principles that underlie this Court's holding apply to all

---

(Cont'd)

United States v. Celestine, 324 F.3d 1095 (9th Cir. 2003); *United States v. Beckett*, 321 F.3d 26 (1st Cir. 2003); *United States v. Galloway*, 316 F.3d 624 (6th Cir. 2003); *United States v. Wesley*, 293 F.3d 541 (D.C. Cir. 2002); *United States v. Mattison*, 153 F.3d 406 (7th Cir. 1998); *United States v. Harlan*, 35 F.3d 176 (5th Cir. 1994); *United States v. Ford*, 34 F.3d 992 (11th Cir. 1994); *United States v. Smith*, 30 F.3d 568 (4th Cir. 1994); *United States v. Williams*, 3 F.3d 69 (3d Cir. 1993).

probable cause determinations. If courts are to review non-affidavit decisions *de novo*, where the magistrate is making credibility decisions, the standard should be no less where there are no such decisions. As this Court in *Ornelas*, while establishing a *de novo* standard of review for warrantless searches, recognized:

> (1) "A policy of sweeping deference" would mean that the outcome in the absence of any significant difference in the facts would turn on the trial judge's "general conclusions that the facts are sufficient or insufficient," which "would be inconsistent with the idea of a unitary system of law."
>
> (2) Because "the legal rules for probable cause and reasonable suspicion acquire content only through application," independent review is "necessary if appellate courts are to maintain control of, and to clarify the legal principles."[6]
>
> (3) *De novo* review "tends to unify precedent and will come closer to providing law enforcement officers with a defined "set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to

6. *See also See also Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) (where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law").

> whether an invasion of privacy is justified in the interest of law enforcement."

LaFave, *supra* (quoting *Ornelas* at 697-99) (internal quotations deleted).

However, a fourth rationale for *de novo* review of probable cause determinations is uniquely tailored to warrantless searches. *Ornelas* at 698-99. This Court held that *de novo* review was additionally appropriate in *Ornelas* because the lesser deference "paid when reviewing a decision to issue a warrant" would "eliminate the incentive" for police to seek warrants because "police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determinations to issue a warrant is less than that for warrantless searches." *Id.*

De novo review is especially appropriate when a warrant is issued only on the "four corners" of an affidavit. *United States v. McKinney*, 919 F2d 405 (7th Cir. 1990). The Seventh Circuit, in a concurring opinion, outlined why there is no practical reason to prevent appellate courts from exercising *de novo* review:

> in cases where a warrant issued, and the only hearing was ex parte, an appellate panel will generally be in the same position to evaluate the facts as the district judge or magistrate was. Distance from the facts is no justification for a clear error standard in such a case.

Id. at 426. Therefore, since in a warrant case each has only the affidavit to evaluate, both the magistrate and

appellate court are in equally good positions to evaluate the evidence and make a probable cause determination. *Id.*[7]

Finally, the "justifications and explanations for any type of deferential review, whether it be clear error, substantial basis, or some novel form of intermediate review, are misleading, unfounded, and transparent." *Cooley* at 105. *De novo* remains the preferable standard of review despite claims of this and other courts that de novo review would discourage warrant applications, *Ornelas* at 698-99; would be too hypertechnical, *Gates* at 236; would reduce judicial efficiency, *United States v. McKinney*, 919 F.2d 405, 420 (7th Cir. 1990) (Posner, J., concurring); or would put decisions in the hands of appellate judges too far from the facts of a case, *Id.* at 419. These concerns are unfounded and/or pale in comparison with the legal and constitutional principles violated by their emphasis and the denial of *de novo* review.

Here, if not a pure question of law, the probable cause determination made by the magistrate—since it applied legal principles to a set of facts—was certainly a mixed question and therefore subject to *de novo* review under *Ornelas*. Although this Court's holding in that case dealt with a warrantless probable cause determination, its critical principles apply.

7. "In this situation, the magistrate relies solely on the written facts presented to him in the search warrant application. Because the application is also presented to the trial and appellate courts when review is requested, there should be absolutely no argument that a magistrate had any distinct advantage in determining the existence of probable cause." *Cooley*, supra, at 94.

First, the sweeping deference, warned of by this Court, was visibly apparent in the Pennsylvania Supreme Court's review of the magistrate's decision in this case. By failing to give the appropriate scrutiny to the affidavit itself under the guise of not wanting to make a "hypertechnical" review, the court deprived the appellant of his right to a review of the legal determinations made by the magistrate that led to the search of his room and seizure of his possessions. By failing to apply the "unitary system of law," the Pennsylvania Supreme Court established that the magistrate's 4th Amendment determination should stand unanalyzed.

Next, this Court should recognize that, as with warrantless probable cause reviews, the role of appellate courts in post-warrant review needs to be reinforced to maintain consistency and control over legal precedent. This is particularly applicable to appellant's case; where uncertainty and confusion was manifested by the disparity among majority and concurring opinions.

Third, just as this Court in *Ornelas* wisely held that a defined set of rules was important to guide law enforcement before making warrantless searches, likewise here, a defined set of rules will help law enforcement in preparing affidavits and warrant applications, and clarify for magistrates whether there is sufficient information to establish probable cause. In each incident, the crucial question is whether an invasion of privacy is justified in the interest of law enforcement. That the invasion here took place after a magistrate decision does little to alter the underlying principle expressed by this Court.

Petitioner submits that the policy expressed by this Court in *Ornelas* as to the incentive for police to seek warrants has been rendered less applicable in recent years. Petitioner agrees with Judge Scalia's dissent in *Leon* where he concluded that the good faith doctrine, applicable only in with-warrant cases, is alone "ample incentive to proceed by warrant." *Ornelas* at 705. To the extent that *Gates* was decided when there was deference to reviewing warrantless searches, and to the extent that there is a need for "uniformity," the principles expressed in *Ornelas* suggest that *de novo* should apply to warranted searches as well. As seen in precedent established by circuit courts and the concurring opinion in this case, the need for consistency and uniformity is clear. Moreover, the three principles established by this Court in *Ornelas* vastly outweigh this policy argument in terms of practicality, efficiency, and the role of appellate courts overall.[8]

8. Additionally, there is little evidence to suggest that magistrates themselves provide much scrutiny in terms of rejecting affidavits when failing for specificity. *See* Jeffrey M. Grybowski, Note, *The Appellate Role in Ensuring Justice in Fourth Amendment Controversies: Ornelas v. United States*, 75 N.C. L. REV. 1819, 1840-41 (1997) (footnote omitted)

> [A]n obstacle to the persuasive use of the efficiency rationale by either side of the debate is the lack of empirical data proving the efficacy or waste associated with a de novo rule in mixed-question situations. Unlike other policy factors at issue, efficiency must focus only on the actual consequences of a judicial decision. Whether appellate resources are more efficiently utilized in reviewing trial court

(Cont'd)

Also, as urged above, this case exemplifies just how an appellate court possesses the same resources as the magistrate in making its legal determination. There was no reason for the appellate court to defer here, since the appellate courts had the same information—the police affidavit—unaided by testimony or other evidence from the police, as did the magistrate.

Finally, the concerns raised by courts against *de novo* review are unavailing. *De novo* review need not include any added level scrutiny and need only involve evaluation under appropriate federal or constitutional terms. Any negative effect this standard of review might have on judicial efficiency is outweighed by the imperatives of preserving the sanctity of 4th Amendment rights. As the appellate judges would be privy to the same materials as the magistrate was, it makes little difference how close the magistrate was to the facts; indeed, there might be a risk of a magistrate being too familiar with law enforcement officers who routinely present affidavits before him or her as opposed to a more neutral and detached appellate judge.

Because warrant sufficiency poses a question that is solely the legal test of whether the factual information in the affidavit has a sufficient "nexus" with the place to be searched, the rules for *de novo* review outlined in

(Cont'd)

> determinations for precise correctness or in clarifying broad legal rules is a question to which the answer can only be surmised, since no data exist to assist this examination. Advocates must therefore turn to other factors for justification.

Ornelas and other precedent should be equally applicable in reviewing the magistrate's determination in this case. De novo remains the most logical and fairest option for this Court to apply in reviewing magistrate determinations of probable cause.

C. If not *de novo*, this Court should articulate an intermediate approach, as the confusion and disparity caused *Gates* has led to an unconstitutionally excessive deference to magistrate decisions.

This Court's adoption of a flexible standard in *Gates* predated the Court's embrace, in *Ornelas*, of de novo review and thus, the Court's statements in *Gates* carry little weight. Moreover, even if *Gates* were interpreted to preclude—or make more difficult-adoption of a *de novo* standard of review, *Gates* pronounced no such bar on an intermediate standard of review that clearly rejects a clear error approach and allows appellate courts to better address legal questions raised by claims of warrant insufficiency. An overly deferential standard is unconstitutional, contrary to this Court's holdings in *Gates* and *Leon*, and has harmful policy consequences. Therefore, this Court should now adopt a clear standard that, if not rising to the level of *de novo* review, provides an appropriate level of scrutiny to avoid the legal confusion and problems visited upon Mr. Jones.

Deference to magistrates undercuts the Fourth Amendment of the United States Constitution. *Cooley* at 86. Excessive limits on the amount of review available on appeal amounts to "unacceptable judicial preferences limiting Fourth Amendment rights" and turning one's back on victims of constitutional violations. *Id.* Indeed, this

Court in *Gates* spoke of the need to balance individual liberties with societal protection. *Gates* at 241 ("fidelity" to the commands of the Constitution suggests balanced judgment rather than exhortation). In *Gates*, this Court used the balance argument to oppose an overly aggressive review. The principle similarly applies to the proposition that clear error, or some similarly over-deferential standard should be applied to magistrate determinations: a balance in consideration of a judge's constitutional obligation forbids it.[9]

A Fourth Amendment determination should turn on a trial judge's application of law to facts alone. *Brinegar v. U.S.*, 338 U.S. 160, 170 (1949). This Court emphasized the constitutional importance of enabling review of probable cause determinations. *Id.* In evaluating a warrantless probable cause determination made by law enforcement officials, this Court reasoned "in the absence of any significant difference in the facts, it cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Id.*

The lack of empirical analysis of search warrant data suggests that magistrates virtually never reject an application for a search warrant. *Grybowski, supra*. Under such circumstances, a standard deferring to what is effectively a "rubber stamp" practice does not sufficiently protect the Fourth Amendment interests of citizens. The practical effect of this standard then is that law

9. *See also Cooley*, supra, at 87 ("the level of probable cause required to issue a search warrant is essentially the threshold at which the necessity of government intrusion intersects with an individual's right to privacy.").

enforcement officials—not judges— make the actual probable cause determination. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). This concern highlights the need for appellate review to assure that independent and unbiased decisions are being made by magistrates who are appropriately detached from law enforcement and the investigation itself. *Id. See also Cooley*, *supra*, at 90.

In *Gates*, this Court did not require a "clearly erroneous" standard of review. *Gates*, *supra*, at 236. While expressly rejecting *de novo* review—noting "that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review"—interpreting *Gates* to require the opposite, a clearly erroneous review, is improper. *Id.* In *Gates*, this Court never required, nor even mentioned, the "clear error" standard used by some circuits interpreting the decision. *Id.*[10] Instead, this Court

> reaffirmed its established position regarding the standard for reviewing a magistrate's

10. *Cooley* offers why this Court did not intend for a clear error standard, and why, therefore it must be clearly rejected: "Clear error review would be incredibly confusing. Were a reviewing court required to review for clear error, it would have to perform two independent and ambiguous tasks. A court would have to determine whether it was clearly erroneous for a magistrate to determine that there was a substantial basis for finding probable cause. It is hard to imagine that the Court was determined to intentionally make review unnecessarily difficult. *Gates* merely requires a reviewing court to determine whether there was a substantial basis for finding probable cause. It would be much easier and more consistent with the test for a reviewing court to do just that. There is no reason to employ a double layer of ambiguous review. Moreover, if the Court intended that courts apply solely clear error review, continually reaffirming and emphasizing its substantial basis language would be entirely unnecessary. Cooley, supra, at 102.

> determination of probable cause in the issuance of search warrants. "[T]he traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more."

Gates, 462 U.S. at 236 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). As outside observers have said lower courts have been left to determine what degree of review applies in determining whether a "substantial basis" existed. *Cooley* at 96.

It is true that *Gates* said that: "a grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant courts should not invalidate . . . warrant[s] by interpreting affidavit [s] in a hyper-technical, rather than a commonsense, manner." *Id.* at 236 (citations omitted). While this may indicate a more deferential standard of appellate review than *de novo*, it calls for clear error neither in language nor spirit. *Id.* By finding that "sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others," *Id.* at 238-39, this Court clearly rejected the kind of rubber stamping advocated by certain circuits and put into action by the Pennsylvania Supreme Court. *See also United States v. Wilhelm*, 80 F3d 116, 120 (4th Cir. 1996) (finding the magistrate judge erred "by simply accepting the unsupported conclusions of the affidavit").

This Court further expressed its preference for an intermediary standard of review in *U.S. v. Leon*, 468 U.S. 897, 923 (1984). The application of clearly erroneous review to magistrate probable cause determinations contradicts the exclusionary rule exception established in *Leon*. *Cooley* at 100. By establishing a good faith exception to warrants found to violate the 4th Amendment, *Id.* at 924, this Court presupposed that magistrate determinations should be subject to some kind of intermediate review. *Cooley* at 104. If review for clear error were the standard, *Leon* would be moot, as only clearly erroneous warrants would be invalidated: "if this were the case, how could an officer ever act in good faith based on a warrant so lacking in probable cause that it would be clearly erroneous for a magistrate to issue it?" *Cooley* at 104.

As indicated above, in the welter of uncertainty and various tests which *Gates* has propagated, some courts appear to have adopted and intermediate standard of review. *United States v. Leake*, 998 F.2d 1359 (6th Cir. 1993). The Sixth Circuit first acknowledged that clear error review was appropriate for questions of fact, and plenary review for questions of law in warrantless searches. *Id.* at 1362. There, the court also indicated that appellate courts should review whether magistrates had substantial basis for finding probable cause, but declined to utilize "clear error," despite applying it earlier to factual situations. *Id.* at 1363. The court "chose instead to favor the lighter substantial basis language emphasized in *Gates*." *Cooley* at 99-100.

Also, an intermediate review would be in line with this Court's policy favoring unified precedent and clear rules for law enforcement and magistrates alike to follow. *Ornelas*, supra, at 697-99. While in *Ornelas*, this Court established the importance of *de novo* review for unifying legal precedent, even a standard allowing less scrutiny than *de novo* review, could nevertheless accomplish some of this Court's own goals. *Id.* The important aspect is that law enforcement and magistrate or trial judges all are informed by a consistent and dependable application of the law to the facts that determine probable cause. A standard more rigorous than clear error is critical to establish the authority of appellate courts in applying and enforcing constitutional rights. "That allocation is of considerable importance, for it has much to do with the real-life meaning of those rights, and as well with the fairness and efficiency of the appellate process." LaFave, supra.

Finally, as suggested above, and as this Court has recognized in *Gates*, a magistrate must not be a rubber stamp for police. *Gates*, supra, at 239. This Court and others suggest that only a less deferential standard of review can provide the appropriate check on such behavior. *Id.* This Court had previously held that

> deference to magistrate is not boundless . . . does not preclude inquiry into the knowing or reckless falsity of the affidavit . . . courts must insist magistrate . . . not serve merely as a rubber stamp for the police . . . reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate

> with a substantial basis for determining the existence of probable cause.

United States v. Ventresca, 380 U.S. 102, 109 (1965). *See also United States v. Wilhelm*, 80 F.3d 116, 120 (4th Cir. 1996) (finding the magistrate judge erred "by simply accepting the unsupported conclusions of the affidavit").

In this case, while appellant urges this Court to adopt the same standard for warranted searches as it applies in warrantless searches, Mr. Jones recognizes that even a somewhat less rigorous rule would serve the interests of law enforcement and the constitutional right to privacy.

However, the Pennsylvania Supreme Court applied such a deferential standard of review as to chill Mr. Jones' constitutional rights. By not allowing the appropriate review of the magistrate decision, that court allowed an unconstitutional search to go unchecked, to the consequence of his conviction for murder.

It also wrongly applied guidance provided by this Court in *Gates*—following doggedly its warning against hypertechnicality while ignoring its charge to not merely ratify "the bare conclusions of others." *Gates* at 239. Likewise, the point of *Leon*'s good faith exception is defeated when a court refuses to allow reviewing courts to scrutinize and reject a warrant in the first place.

Like other courts have done, this Court would be wise to choose to establish a clear, independent standard of review that represents an intermediate level of

scrutiny far more rigorous than clear error, yet not quite as much as *de novo*. Such a holding would help unify precedent, giving judges, attorneys and law enforcement consistent expectations of how warrants may be obtained. On the other hand, failure to side with the appellant would be amount to an approval of the Pennsylvania Supreme Court's decision to allow the magistrate's apparent reasonless rubber-stamping of the affidavit.

This case demonstrates the danger in embracing anything less than a highly rigorous standard of review. The affidavit in this case was disastrously weak. As discussed more fully below, even under current standards which require a "nexus" between the information in the affidavit and the items sought, this affidavit falls short. But the issuance of this warrant, then reviewed by a "deferential" standard, raises questions of the independence of magistrates generally, a question which is underlined by the data on the issuance of search warrants mentioned above.

D. Whatever standard the Court adopts here, the confusion that reigned in the Pennsylvania Supreme Court requires that Mr. Jones' appeal be remanded.

This Court should now articulate the precise standard by which appellate courts should assess the issuance of search warrants based upon affidavits. While the appellant suggests that the Court adopt a "*de novo*" standard, consistent with this Court's fundamental pronouncements in *Ornelas*, any standard that rejects review for clear error only and embraces a more thorough review would both clarify the law and establish a clear path for police, magistrates, and appellate courts in the future.

Once this Court has articulated a clear standard of review—be it *de novo* or some intermediate approach—Mr. Jones' appeal should be remanded for consideration under the new standard.[11] The approach of the Pennsylvania Supreme Court was marred by the confusion the Court can now eliminate by establishing a new standard of review. Therefore, it is appropriate to allow Mr. Jones' appeal to be reheard under a standard that is clearly enunciated and attuned to the constitutional concerns that proved so harmful below.

II. Even Under A Standard Of "Great Deference," The Court Below Wrongly Found That There Was Probable Cause For The Search Warrant To Issue.

The Pennsylvania Supreme Court supplied justifications for the magistrate's issuance of a search warrant that were not supplied by the police and cannot be supported by even the most generous interpretation of the deferential basis for review discussed by this Court in *Leon*. In the search warrant application, the police identify two categories of evidence that they were pursuing: identification of the victim; and evidence presumably related to the motive and circumstances behind the victim's murder. Police failed to supply a rationale for the need to search for this evidence or any facts that would tend to show a nexus between petitioner's residence and the crime.

First, with respect to the identification evidence, it is plain that police had identified Abdul Sesay as the victim

11. The appellant recognizes that remand is the most appropriate result to request from the Court on this issue, although it is in fact the most minimal remedy available, since a reversal of his conviction would be possible under de novo review.

prior to applying for the warrant. His campus dorm key was found on his person and police had matched a photograph obtained from Widener University security. What is starkly absent from the warrant application is any explanation by the police as to why they required further identification evidence. For example, there is nothing stated as to other students and residents of the victim's dorms inability to provide a positive identification of the victim or that the family members of the victim could not be reached in a timely fashion. The Supreme Court argues, on behalf of the police, that "access to the dormitory room was required to obtain conclusive identification of the victim." Such an argument was neither tendered by the police nor is that a necessary inference from the information the police did provide. Moreover, to excuse police from having to justify a search for identification when a victim has already been identified is to invite the stated need for identification as a pretext to obtain a warrant.

With respect to the second category, the evidence sought by police, cell phones, pagers, drugs, drug paraphernalia, handguns, and bullets, the affidavit failed to set forth a substantial basis for the magistrate to conclude there was probable cause of a connection between the sought after evidence and the crime the police were investigating. In her concurrence to the Pennsylvania Supreme Court opinion, Justice Todd summarized the issue well by stating that the

> affidavit is utterly devoid of any facts that would establish a fair probability that Sesay's death was somehow drug-related or that items relating to drug dealing would be found in the dormitory room. As the shooting of Sesay took place in a public area blocks away from the room,

> the affidavit fails to set forth any facts which would indicate why there was a fair probability that handguns or bullets involved in the shooting could be found in the room.

App. at 44a-45a.

In its headless deference to the magistrate, the majority put a facile gloss over this omission by finding that the police sought to obtain evidence to further their investigation. In so holding, the lower court failed in its responsibility to scrutinize the police submission. By validating this warrant, the Pennsylvania Supreme Court has, in effect, turned over to police the role of the magistrate in the warrant issuing process and then accorded the police near total deference. Here, the police offer virtually nothing more than their belief that evidence of the crime might be found in the joint residence of the victim and petitioner, and that was enough for the magistrate and the Pennsylvania Supreme Court to justify issuance of the warrant.

The warrant is sorely lacking in factual detail, or any rationale that would explain the police felt the need to seek identification evidence in petitioner/victim's dorm room. Indeed, it is written in a pro forma, expectant manner and simply recites a bare minimum of facts. The a priori expectation of approval by the magistrate may explain the haphazard preparation that led to the glaringly incorrect date. Nor was there information to support a probable cause finding that the other evidence sought was pertinent to the crime or would be found in the joint residence.

This case presents the unique opportunity for this Court to clarify this standard of review to be applied by

courts reviewing a magistrate's decision to issue a search warrant and to more clearly define the nature and quality of information that would be sufficient for a magistrate to issue such a warrant.

CONCLUSION

The Pennsylvania Supreme Court's deference to the magistrate in this case was excessive and led to legal error. The court below should have affirmed the decision of the Pennsylvania Superior Court which found the warrant application lacking in probable cause. This Court should reverse the judgment of the Pennsylvania Supreme Court, and issue an opinion clarifying the appropriate standard of review to be applied to a magistrate's decision for the issuance of a search warrant, and remand the case for a new trial.

Petitioner submits that this Court should establish de novo review of magistrates' warrant decision. It is imperative that a standard be defined in such a manner that reviewing courts will not feel compelled to all but advocate their scrutiny of a warrant as has occurred in this case. Petitioner respectfully prays that the Court grant the within petition.

Respectfully submitted,

Alan J. Tauber
Levant, Martin & Tauber, P.C.
320 North 18th Street
Philadelphia, PA 19103
(215) 564-5959
atauber@lmtpc.com

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DECIDED FEBRUARY 16, 2010

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, GREENSPAN, JJ.

No. 40 MAP 2008

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

CURTIS JONES,

Appellee

Appeal from the Opinion and Order of the Superior Court dated June 14, 2007, 928 A.2d 1054 (Pa. Super. 2007), 2874 EDA 2005, vacating the judgment of sentence imposed by the Court of Common Pleas of Delaware County entered September 7, 2005 at No. 1758 02 CR 162 02 and remanding for further proceedings

ARGUED: October 22, 2008

Appendix A

OPINION

MR. JUSTICE McCAFFERY
DECIDED: February 16, 2010

The Commonwealth of Pennsylvania appeals from the order of the Superior Court vacating Curtis Jones's judgment of sentence for first-degree murder and robbery. The Superior Court concluded that the search warrant issued during the investigation of the murder and robbery was invalid and that evidence seized pursuant to that warrant should have been suppressed. We reverse, concluding that the Superior Court erred by not upholding the validity of a search warrant supported by probable cause.

In the early hours of April 15, 2002, Chester City police officers responded to reports of gunfire occurring on the campus of Widener University. The investigating officers spoke to a witness who stated that he had heard five gunshots and then saw, from his bedroom window, a tall individual running from the area. The witness provided a description of the fleeing individual that was later determined to match that of Jones. The police soon thereafter located the victim's dead body lying in a pool of blood, riddled with five gunshot wounds. Shortly after the body's discovery, and based on a set of keys found on the body that suggested the victim may have been a student at the university, university personnel provided a photograph to police that appeared to identify the victim as Abdul Sesay, a 20-year-old student. No other identity materials were found on the body. At the time

of his death, Sesay was rooming with fellow student Curtis Jones in a university dormitory "blocks away from" the crime scene. *Commonwealth v. Jones*, 2007 PA Super 181, 928 A.2d 1054, 1060 (Pa.Super. 2007).

At approximately 11:00 a.m. that same morning, police interviewed Jones, at which time he provided them with a version of the events of the previous evening. Jones told police that Sesay had left their dormitory room (and the company of their friends who had gathered in the room) after receiving a call on his cellular telephone. Jones told police that at the time, Sesay stated that he would be back, but he did not return.

In the early afternoon of the same day, a magisterial district judge issued a search warrant for Sesay's and Jones's dormitory room. The affidavit of probable cause stated as follows:

> On 2/19/2001[1] Officer Gizzi responded to the area of the 100[0] blk of East 18th St. for a call of shots fired. Upon arrival the officer was advised by witnesses that the shots were coming from the end of the street[.] Officer Gizzi then went to the end of the [s]treet and

1. The affidavit of probable cause set forth an incorrect investigation date, an error later described as caused by a hasty cut-and-paste procedure. Both the suppression court and the Superior Court determined that this technical mistake had no impact on the validity of the search warrant, a conclusion with which we do not disagree.

> discovered a B/M wearing a black shirt and black jeans shorts laying [sic] on his back in a pool of blood with what appeared to be gunshot wounds to the head[.] [T]he victim was unresponsive and not breathing. Paramedics [pro]nounced the victim deceased at 0216 [h]rs.
>
> Det. Hampel discovered keys on the victim[']s body that belonged to Widener University[.] Upon checking with Widener Security it was found that the victim may have been a [W]idener student[.] [A] picture was given to police by Widener Security and was compared to the victim that was discovered on the 1000 blk of East 18th Street, and found [sic] that the victim and the picture provided to police were identical.
>
> With the information provided[, p]olice believe that the victim is Abdul Sesay[,] B/M/20[,] who resides [sic] Widener University Campus at [T]hayer Hall Room # 306[.]

Id. at 1059. The application for the search warrant sought "Any evidence that provides Identification/ Cellular Phones, Pagers, Drugs, Drug Paraphanalia [sic], handguns, bullets." *Id.*

The search warrant was executed that afternoon, while Jones was away on a shopping trip with friends in New Jersey with a cache of newly found money. Seized

from the dormitory room were items that the Commonwealth asserted were observed by the police in plain view. These items were the victim's cellular telephone, which was observed to have blood on it (the blood was later determined to match that of the victim); a cellular telephone box and sales paperwork concerning this telephone in the victim's name; a Glock handgun users' manual; white t-shirts, one of which, ultimately determined to belong to Jones, contained a bloodstain on it (the blood was later determined to match that of the victim); other clothing, including shorts owned or worn by Jones but exhibiting blood later determined to be that of the victim; and three damp wash cloths. The suspicions of the police were aroused when they found the victim's cellular telephone because Jones had previously told them that the victim had taken it with him on the evening of the murder.

The police interviewed Jones once again the next day, at which time Jones changed his story. In this second interview, Jones asserted that after Sesay received the cellular telephone call, Sesay placed a gun that he owned in his waistband and then asked Jones to accompany him as he went to meet the caller. Jones further stated that when the two neared the scene of the eventual shooting, Sesay instructed Jones to hide behind a bush in case the person they were to meet caused trouble. Sesay purportedly told Jones that in the event of trouble, Jones was to jump from behind the bush to distract the third party so that Sesay would have a better opportunity to shoot this person. Jones then stated that a truck pulled up driven by a black male

and carrying a white female passenger; and, after an exchange of words between Sesay and the third-party male, gunfire erupted. The truck then abruptly drove away. Jones stated that he observed Sesay lying critically wounded on the ground. Jones then told police that he grabbed Sesay's cellular telephone and ran back to the dormitory room. At the end of the interview, Jones gave the police permission to search the dormitory room.

After this interview, Jones volunteered to go to the police criminal investigation unit to take a polygraph test. Jones was given his Miranda warnings[2] at that time, and he signed a form acknowledging his receipt and understanding of these warnings. During the interview that followed, Jones initially reverted to his first story that he had given the police, but shortly thereafter returned to his second version of events (that involving the purported gunfight with the truck driver) with additional embellishments.

A police diver subsequently recovered the murder weapon from a lake located behind the house of Jones's mother in New Jersey after police received an anonymous tip.[3] Jones's friends, who had accompanied him on his post-murder shopping trip, told police that on the day after the shooting, and prior to going to stores, they had accompanied Jones to his mother's

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

3. The murder weapon was later identified as Sesay's Glock handgun. It was established at trial that Sesay was a drug dealer.

house. There, his friends observed that Jones went behind the house for a lengthy period. Having obtained statements from Jones and other witnesses, and having recovered the murder weapon, the police arrested Jones for the murder and robbery of Abdul Sesay.

Arguing violations of the Pennsylvania Constitution and the United States Constitution, Jones filed pre-trial motions to suppress his statements made to the police and the evidence seized pursuant to the search warrant issued on April 15th.[4] Following a hearing, the suppression court denied the motions. In explaining its determination to deny Jones's motion to suppress evidence seized pursuant to the search warrant, the trial court stated, without further analysis, that under "the totality of the circumstances and using a common sense approach," the affidavit of probable cause supporting the search warrant established that the police had probable cause to search the dorm room. Trial Court Opinion, dated June 6, 2006, at 25. The court also determined that even if the search warrant were found to be invalid, items seized pursuant to the warrant should not be suppressed because (1) Jones gave his permission to the police to search the room; and (2) the police would have inevitably discovered the evidence as part of their investigation. Jones was ultimately convicted by a jury of first degree murder and robbery

4. Apparently, all of the physical evidence that Jones wished to suppress was seized on April 15, 2002, before Jones had given his permission to search the dormitory room on April 16, 2002.

and sentenced to life imprisonment for murder, with a consecutive sentence of 66 to 132 months' imprisonment for robbery.

On direct appeal, the Superior Court vacated the judgment of sentence and remanded the matter for further proceedings after determining that the suppression court had erred by failing to suppress the evidence seized pursuant to the search warrant, which the Superior Court determined was not supported by probable cause.[5] The court held:

> As [Jones] points out, the affidavit contains no explanation as to why police would expect to find the evidence listed in the warrant in the victim's dormitory room. Nothing in the affidavit states that the victim's death was drug-related, yet some of the evidence sought clearly is so related. Because the affidavit gives no indication that contraband or evidence of a crime will be found in the victim's dorm room blocks away from the crime scene, it is not supported by probable cause.
>
> Moreover, although identification evidence belonging to Abdul Sesay would arguably logically be found in his room, it is clear from the warrant that police had already identified the victim as Abdul Sesay[;] thus, there was no reason to search for additional identification evidence, [and] certainly there

5. The Superior Court affirmed the suppression court's denial of Jones's motion to suppress statements made to the police.

> was no stated reason. As such, there is no probable cause to support the issuance of the search warrant for identification purposes.
>
> For these reasons, the issuing authority had no basis upon which to authorize the search of [Jones's] and the victim's dorm room and the lower court erred in determining that the warrant was supported by probable cause and failing to suppress the evidence seized from the room.

Jones, supra at 1059-60. Aside from citing general principles of law regarding an appellate court's review of the suppression court's determination that a search warrant was valid, the Superior Court cited no case law specific to its conclusions.[6]

We granted the Commonwealth's petition for allowance of appeal and directed the parties to address the following issue: Whether the Superior Court erred

6. Further, the Superior Court rejected the trial court's alternative arguments that the items seized should not be suppressed because Jones had given the police permission to search the dormitory room and/or that the police would have inevitably found the objects during their investigation. The court noted that Jones had not given his permission to search until *after* the search warrant had been executed, and that the trial court had failed to articulate any support for its conclusion that the police would have inevitably uncovered the seized items.

by concluding that probable cause did not support the issuance of the search warrant of a murder victim's residence for investigatory purposes.

Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831, 842 (Pa. 2003). Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, "whose duty it is to determine if the suppression court properly applied the law to the facts." *Commonwealth v. Mistler*, 590 Pa. 390, 912 A.2d 1265, 1269 (Pa. 2006) (quoting *Commonwealth v. Nester*, 551 Pa. 157, 709 A.2d 879, 881 (Pa. 1998)). Thus, the conclusions of law of the courts below are subject to our plenary review. *Mistler, supra*; *Commonwealth v. Morley*, 545 Pa. 420, 681 A.2d 1254, 1256 n.2 (Pa. 1996).

Before the suppression court, Jones challenged the legality of the search warrant under the Pennsylvania

and United States Constitutions, arguing only that the warrant was not supported by probable cause. Thus, Jones's challenge has root in Article I, Section 8 of the Pennsylvania Constitution[7] and the Fourth Amendment to the United States Constitution.[8] [9]

Article I, Section 8 and the Fourth Amendment each require that search warrants be supported by probable

---

7. Article I, Section 8 of the Pennsylvania Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. art. I, § 8.

8. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

9. Jones has never set forth an argument as to why he should be afforded greater protection under Article I, Section 8 than under the Fourth Amendment.

cause. "The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause." *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 899 (Pa.1991) (quoting *Commonwealth v. Miller*, 513 Pa. 118, 518 A.2d 1187, 1191 (Pa. 1986)). "Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." *Commonwealth v. Thomas*, 448 Pa. 42, 292 A.2d 352, 357 (Pa. 1972).

In *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the United States Supreme Court established the "totality of the circumstances" test for determining whether a request for a search warrant under the Fourth Amendment is supported by probable cause. In *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921 (Pa. 1986), this Court adopted the totality of the circumstances test for purposes of making and reviewing probable cause determinations under *Article I, Section 8*. In describing this test, we stated:

> Pursuant to the "totality of the circumstances" test set forth by the United States Supreme Court in Gates, the task of an issuing authority is simply to make a practical, commonsense decision whether, given all of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying

> hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . It is the duty of a court reviewing an issuing authority's probable cause determination to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In so doing, the reviewing court must accord deference to the issuing authority's probable cause determination, and must view the information offered to establish probable cause in a common-sense, non-technical manner.
>
> * * * *
>
> [Further,] a reviewing court [is] not to conduct a de novo review of the issuing authority's probable cause determination, but [is] simply to determine whether or not there is substantial evidence in the record supporting the decision to issue the warrant.

Commonwealth v. Torres, 564 Pa. 86, 764 A.2d 532, 537-38, 540 (Pa. 2001).

As our United States Supreme Court stated: "A grudging or negative attitude by reviewing courts towards warrants . . . is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical,

rather than a commonsense, manner." *Gates, supra* at 236 (citation and quotation marks omitted); *see also United States v. Leon*, 468 U.S. 897, 914, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) ("Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination.").[10]

Moreover, the "plain view doctrine" is wholly applicable to search and seizure issues under both the Fourth Amendment and Article I, Section 8. *See McCree, supra* at 626-28, 631. This doctrine permits a valid warrantless seizure of an item where: (1) the police have not violated the Fourth Amendment in arriving at the location from which the item could be viewed; (2) the item is in plain view; (3) the incriminating character of the item is immediately apparent; and (4) the police have

10. This Court has more often used the nomenclature "due deference" rather than "great deference" to describe the relevant standard. See, e.g., *Commonwealth v. Rega*, 593 Pa. 659, 933 A.2d 997, 1013 (Pa. 2007); *Commonwealth v. Rompilla*, 539 Pa. 499, 653 A.2d 626, 632 (Pa. 1995); *Commonwealth v. Baker*, 532 Pa. 121, 615 A.2d 23, 25 (Pa. 1992); *Commonwealth v. Moss*, 518 Pa. 337, 543 A.2d 514, 518 (Pa. 1988); and *Commonwealth v. Jones*, 506 Pa. 262, 484 A.2d 1383, 1387 (Pa. 1984) (all articulating a due deference standard). However, as the question of such nomenclature is not pertinent to our disposition of the present appeal, we will not engage in any further discussion regarding this discrepancy in language or whether such discrepancy is reflective of any practical difference.

a lawful right of access to the item itself.[11] *Horton v. California*, 496 U.S. 128, 133, 136-37, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *McCree*, *supra* at 625; *Commonwealth v. Graham*, 554 Pa. 472, 721 A.2d 1075, 1079 (Pa. 1998); *see also Commonwealth v. McCullum*, 529 Pa. 117, 602 A.2d 313, 320-21 (Pa. 1992) (implicitly recognizing that exigent circumstances may establish the basis for a lawful right of access).

In view of the above principles, it is readily apparent that the Superior Court erred in its conclusion that the search warrant issued in this case lacked probable cause and that the evidence seized by the police should have been excluded from introduction at trial.

Here, the police were investigating a murder. The victim appeared to be Abdul Sesay, whose dormitory room was located within several blocks of where his bullet-riddled body was found. The relevant evidence set forth in the affidavit of probable cause for the search warrant of the dormitory room was that a body was found shot to death in the City of Chester and that keys found on the body and a university student photograph indicated that a nearby dormitory room was the last known residence of the victim. Accordingly, the police sought to obtain evidence both to confirm the identity of the victim and to further their investigation. That evidence included, as listed in the application for the warrant, cellular telephones and pagers, which, if found,

11. The four prongs are sometimes combined as three. *See, e.g.*, *McCree*, *supra* at 625, 628.

could provide leads with regard to any individuals who had spoken with or contacted the victim on the night of his murder.

There can be no doubt that the facts set forth in the affidavit of probable cause in this case "are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." *Thomas, supra* at 357. The affidavit of probable cause reasonably identified what was probably the last residence of the victim, within which there was a fair probability that the police would find evidence of the murder that had occurred nearby. Moreover, access to the dormitory room was required to obtain conclusive identification of the victim. The need for police to have conclusive identification was self-evident: to conduct an investigation intelligently, to have all reasonable certainty before contacting family members to inform them that their loved one has been murdered, and to provide the prosecution with the first piece of information the Commonwealth would be required to prove at a murder trial, i.e., that a specific individual had been found dead.

The Superior Court concluded that it was not necessary for the police to obtain further information concerning the identity of the victim.[12] However, there

12. The Superior Court stated:

> Moreover, although identification evidence belonging to Abdul Sesay would arguably logically

(Cont'd)

is nothing in the jurisprudence of Article I, Section 8 or the Fourth Amendment that permits a court to invalidate a warrant supported by probable cause based on the court's belief that the police simply do not need to seek further evidence of a crime. By making such a determination, the Superior Court erred.

In coming to our conclusions, we must reject Jones's argument that a warrant can *never* be used as an investigative tool. Jones cites case law that purportedly supports his argument. Appellee's Brief at 5-6. However, such case law is readily distinguishable and relates to instances where the police only have a mere suspicion that a crime has been committed and/or where the police are unable to describe the items to be searched for "as is reasonably possible." *See In re Casale*, 512 Pa. 548, 517 A.2d 1260, 1263 (Pa. 1986) (stating that a search warrant "is not available as a general investigatory tool to be used in place of a grand jury.") (emphasis added); *Commonwealth v. Smith*, 511 Pa. 36, 511 A.2d 796, 801 (Pa. 1986) (stating that "mere suspicions" of a possible crime "do not constitute probable cause to support a

(Cont'd)

> be found in his room, it is clear from the warrant that police had already identified the victim as Abdul Sesay[;] thus, there was no reason to search for additional identification evidence, [and] certainly there was no stated reason. As such, there is no probable cause to support the issuance of the search warrant for identification purposes.

Jones, supra at 1060.

search warrant"); *Commonwealth v. Bagley*, 408 Pa. Super. 188, 596 A.2d 811, 815 (Pa.Super. 1991) (quoting Casale, and determining that the police could not execute a warrant to search the home of the decedent and her surviving husband for unspecified evidence that might shed light on her death in order to determine whether a crime had been committed). Here, there was no question that a crime had been committed and that the police could, with fair probability, expect to find evidence related to that crime in what was reasonably believed to be the dead victim's dormitory room, including evidence concerning the positive identification of the victim and any persons with whom the victim may have had recent contact or with whom he may have been involved.

Pursuant to our Rules of Criminal Procedure, a search warrant may be used as an investigative tool, under the appropriate circumstances. Rules 200-211 govern the issuance of search warrants. Relevantly, Rule 201 defines the purposes of a search warrant as follows:

> **Rule 201. Purpose of Warrant**
>
> A search warrant may be issued to search for and to seize:
>
> (1) contraband, the fruits of a crime, or things otherwise criminally possessed; or

(2) property that is or has been used as the means of committing a criminal offense; or

(3) property that constitutes evidence of the commission of a criminal offense.

Pa.R.Crim.P. 201.

Notable is the third enumerated purpose: to search for "property that constitutes evidence of the commission of a criminal offense." Pa.R.Crim.P. 201(3). The "comment" to Rule 201(3) references *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). In Warden, the United States Supreme Court reversed case law holding that only contraband and the fruits of a crime can be seized pursuant to the Fourth Amendment, but not "mere evidence." The Court determined that nothing in the Fourth Amendment supports a distinction between contraband and "mere evidence," concluding that evidence of a crime is clearly subject to search and seizure under the Fourth Amendment. The Court held that it is reasonable under the Fourth Amendment to conduct otherwise permissible searches for purpose of obtaining evidence that would aid in apprehending and convicting criminals. *Id.* at 306-07; *see also Commonwealth v. Butler*, 448 Pa. 128, 291 A.2d 89, 90 (Pa. 1972) (holding that a search and seizure may be for "purely evidentiary items" when there is a "nexus between the items to be seized and the suspected crime," citing and quoting *Warden, supra* at 307).

Therefore, under Rule 201(3), we recognize that a search warrant may be issued to search for and seize property that may constitute "mere evidence" concerning a crime that has been committed. Thus, the Superior Court's holding is additionally troubling for the reason that the court appears to have substituted its judgment for that of the police with respect to the direction of the unfolding investigation. The police necessarily should have, within all applicable constitutional and legal limits, the widest possible latitude in determining the manner in which to conduct investigations without a reviewing court making a determination that an aspect of the investigation, based on probable cause, was unnecessary.

Finally, the record supports the suppression court's conclusion that the evidence belonging to Jones that the police seized was in plain view, as all four elements of the doctrine were satisfied: (1) the police were not in violation of the Fourth Amendment as they were on the premises pursuant to a validly issued search warrant; (2) the seized items were in plain view; and (3) the incriminating nature of the items was readily apparent in this gunshot murder investigation, as they appeared to be wearing-apparel stained with blood. Moreover, (4) the police had a lawful right of access to the items because exigent circumstances required seizure of these items. *See McCree*, 924 A.2d at 625 (setting forth the prongs that establish the plain view doctrine). Had the police not seized the items at the point of their discovery, but waited to obtain a warrant for their seizure, the evidence could possibly have disappeared or been

destroyed to avoid detection of crime, thus presenting the police with the appropriate exigent circumstance allowing for a warrantless search and seizure.[13] *See McCullum, supra* at 320-21.

Accordingly, for the above reasons, we reverse the order of the Superior Court granting a new trial and reinstate the judgment of sentence.

Madame Justice Greenspan did not participate in the decision of this case.

13. Clothing and washcloths were not listed items to be seized in the affidavit of probable cause, and thus arguably were not subject to seizure absent exigent circumstances allowing for a plain view seizure.

Concerning the particular items identified in the affidavit of probable cause, we note that the Superior Court erred by vacating the judgment of sentence based on its determination that probable cause did not exist to support the police identification of drugs or drug paraphernalia as items that were to be seized from the dormitory room. Here, no drugs or drug paraphernalia were seized. Suppression of evidence is required only for such evidence that is seized without probable cause; if other evidence seized at the same time is supported by probable cause, it shall not be suppressed. *See Commonwealth v. Bagley*, 408 Pa. Super. 188, 596 A.2d 811, 824 (Pa. Super. 1991); *see also Commonwealth v. Grossman*, 521 Pa. 290, 555 A.2d 896, 900 (Pa. 1989) ("[I]n any assessment of the validity of the description contained in a warrant, a court must initially determine for what items probable cause existed. The sufficiency of the description must then be measured against those items for which there was probable cause. Any unreasonable discrepancy between the items for which there was probable cause and the description in the warrant requires suppression.").

Appendix A

Mr. Justice Eakin joins the opinion.

Mr. Chief Justice Castille files a concurring opinion in which Mr. Justice Baer joins.

Madame Justice Todd files a concurring opinion in which Mr. Justice Saylor joins.

APPENDIX B — CONCURRING OPINION OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DECIDED FEBRUARY 16, 2010

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

No. 40 MAP 2008

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

CURTIS JONES,

Appellee

Appeal from the Opinion and Order of the Superior Court entered June 14, 2007 at 2874 EDA 2005, vacating the Judgment of Sentence of the Court of Common Pleas of Delaware County entered September 7, 2005 at 1758-02 CR-162-02

928 A.2d 1054 (Pa. Super. 2007)

ARGUED: October 22, 2008

Appendix B

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE
DECIDED: February 16, 2010

I join the Majority Opinion. I agree that the search warrant at issue in this straightforward case was supported by probable cause, and the items seized fell within the proper scope of the warrant. I write separately only to address the proper standard of review applicable to the probable cause determination of a magistrate judge under the Fourth Amendment which is, in essence, a question of the level of review that is contemplated by the United States Supreme Court, the ultimate authority on the Fourth Amendment.

The Majority notes that our cases have inconsistently described the review as involving "due deference" and "great deference" in search warrant cases. Maj. Slip Op. at 10 n.10. The Majority then notes that "the question of such nomenclature is not pertinent to our disposition of the present appeal." *Id.* It is correct that we did not specifically accept review in this case to resolve that particular discrepancy in "nomenclature," nor did we accept review to determine the appropriate level of deference, if any, that should be accorded probable cause determinations by magistrates in warrant cases.

On the other hand, identification of the proper standard of review is essential to the proper disposition of any case; the difference between "great," "due" and

"no" deference can be outcome-determinative; appeals involving challenges to warrants are common; and the tension in the relevant cases is apparent. In such circumstances, I believe some commentary is appropriate to guide the bench and bar, and to that end I offer my own preliminary view.

Quoting *Commonwealth v. Torres*, 564 Pa. 86, 764 A.2d 532, 538-40 (Pa. 2001), the Majority begins its [**27] probable cause analysis by describing the reviewing court's responsibility to "accord deference to the issuing authority's probable cause determination," noting that its task is "not to conduct a *de novo* review of the issuing authority's probable cause determination, but [is] simply to determine whether or not there is substantial evidence in the record supporting the decision to issue the warrant." Maj. Slip Op. at 9. The Majority also quotes *United States v. Leon*, 468 U.S. 897, 914, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), for the proposition that the "preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." Maj. Slip Op. at 10.

But the Majority also notes that, more often than not, this Court has described our review of such probable cause determinations as employing an ordinary or "due" deference. Maj. Slip Op. at 10 n.10. *See, e.g.*, *Commonwealth v. Rega*, 593 Pa. 659, 933 A.2d 997, 1013 (Pa. 2007); *Commonwealth v. Rompilla*, 539 Pa. 499, 653 A.2d 626, 632 (Pa. 1995); *Commonwealth v. Baker*, 532 Pa. 121, 615 A.2d 23, 25 (Pa. 1992); *Commonwealth v. Moss*, 518 Pa. 337, 543 A.2d 514, 518 (Pa. 1988);

Commonwealth v. (Theodore) Jones, 506 Pa. 262, 484 A.2d 1383, 1387 (Pa. 1984); *Commonwealth v. Tolbert*, 492 Pa. 576, 424 A.2d 1342, 1344 (Pa. 1981); *see also Torres*, 764 A.2d at 537-38 (omitting "substantial" when actually setting forth standard of review); *id.* at 545 (Castille, J., concurring and dissenting) (criticizing majority's "fail[ure] to accord the issuing authority the deference due its decision" and contrasting due deference with "the sort of hypertechnical, legalistic, hindsight scrutiny that animated the now discarded Aguilar/Spinelli review of warrant affidavits") (citing *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)). Moreover, as Madame Justice Todd develops, a careful reading of the High Court's precedent suggests that it may not have intended any specially deferential standard for reviewing the purely legal question of whether certain uncontested facts amount to probable cause.

We must accept pronouncements from the High Court as they are, and that Court has spoken of some form of heightened deference in this area. *See Leon, supra*. If the deference is intended to extend to the assessment of probable cause in warrant affidavit review, where no fact-finding or credibility determination within the special bailiwick of the magistrate is involved, it is indeed difficult to understand why any measure of "deference" should apply at all. When the question is a purely legal one (such as the question of whether an agreed-upon set of facts and circumstances establishes probable cause), there is no jurisprudential reason for

a reviewing court to defer to the judgment of any entity below: whether it be the trial judge, a magistrate, or a police officer in the field.

Other courts and commentators have struggled over what to make of the suggestion by the High Court that "great deference," rather than *de novo* review, should be exercised when reviewing a magistrate's probable cause determination in a warrant case. A leading academic authority on the Fourth Amendment cogently summarizes the issue and suggests a useful and harmonizing analytical construct which mirrors my own considered view:

> The point, in brief, is simply this: in a warrant case, the appellate court has the same record as the magistrate (that is, the affidavit) and thus is in essentially as good a position as the magistrate was to make the probable cause determination. This being so, one could even argue for de novo review here (as one state has done, and as has sometimes been required elsewhere as to similar situations in which the review was one of factfinding only via documents), except for the fact that we want to give the magistrate's decision some deference "in the express service of the policy of encouraging resort to warrants." Because of this policy, there is good reason why "the reviewing court must give deference to . . . all reasonable inferences drawn by the issuing judge, and then decide whether, based upon the facts explicitly stated in the affidavit, supplemented by those reasonable

> inferences, the affidavit establishes probable cause." But that, it is submitted, is a lesser deference than practicalities make essential as to a suppression hearing judge's decision after hearing conflicting testimony.

LaFave, Wayne R., 6 Search and Seizure § 11.7(c) 455-56 (4th ed. 2004) (footnotes omitted). *See generally id.* at 451-56 (quoting and discussing federal and state cases).

I view the tension in this area, and the concomitant inconsistencies of expression in the caselaw, as resulting from: (1) the special importance of warrants, an investigative process which interposes a judicial officer between state action and individual rights, a process courts seek to encourage; and (2) the related importance of learning from the correction of debunked cases such as *Aguilar* and *Spinelli* that the task of warrant review must be conducted in a practical, and not a hypertechnical, fashion. "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis . . . for conclud[ing] that probable cause existed.'" *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921, 925 (Pa. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)) (alterations and omission in original).

I do not view this sort of real-world "deference" to the practical aspects of warrant review as diluting the power of a reviewing court to render its own judgment on a purely legal question, such as the existence of probable cause. In warrant review, when the facts are not in dispute, the question becomes whether those

facts, considered in their totality, amount to probable cause. However, in applying that standard, we must be mindful of the Fourth Amendment values that are at stake and the realities of law enforcement. Like the Majority, I believe that the Superior Court erred in finding the warrant in this case unsupported by probable cause.[1]

Mr. Justice Baer joins this concurring opinion.

---

1. Generally, this Court does not accept a discretionary appeal merely to correct error. *See* Pa.R.A.P. 1114 ("appeal will be allowed only when there are special and important reasons therefor"). However, the error in this case compromised a murder prosecution in an instance where police secured a search warrant; supervisory correction is warranted in such circumstances.

As further basis for the conclusion that the Superior Court erred, the Majority cites Pennsylvania Rule of Criminal Procedure 201(3) and *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), correctly observing that "a search warrant *may* be used as an investigative tool, under the appropriate circumstances." Maj. Slip Op. at 15 (emphasis in original). I recognize the force in Justice Todd's discussion of the proper approach to such warrants. But in light of the Majority's controlling determination that probable cause existed to support the magistrate's decision to issue the search warrant here, as well as the fact that the items seized were properly the subject of such a warrant, I agree that the Superior Court panel plainly erred in granting relief based on its determination that probable cause did *not* exist to support identification of drugs or drug paraphernalia as items to be seized, as such items were not actually seized. Maj. Slip Op. at 17 n.13.

APPENDIX C — CONCURRING OPINION OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DECIDED FEBRUARY 16, 2010

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

No. 40 MAP 2008

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

CURTIS JONES,

Appellee

Appeal from the Opinion and Order of the Superior Court entered June 14, 2007 at No. 2874 EDA 2005, vacating the judgment of sentence of the Court of Common Pleas of Delaware County, Criminal Division, entered September 7, 2005 at No. 1758 02 CR-162-02

ARGUED: October 22, 2008

CONCURRING OPINION

MADAME JUSTICE TODD
DECIDED: February 16, 2010

I concur in the Majority Opinion insofar as I believe it reaches the correct legal result, namely, that sufficient

probable cause existed for the magisterial district judge to issue a search warrant for the dormitory room jointly shared by Appellee and the decedent, Abdul Sesay, in order to confirm his identity as the shooting victim the police found lying dead on the street in Chester, Pennsylvania. Beyond this narrow agreement with the Majority, I write to make two additional points. First, I agree wholly with Chief Justice Castille's observation in his Concurring Opinion that, although we did not grant allocatur to specifically address the issue of the correct standard of review to be utilized by appellate courts in reviewing a magistrate's determination of probable cause of a search warrant, application of the proper standard of review by an appellate court is essential to its adjudicative function. I am in accord with his cogent discussion, and, presently, offer only a few additional observations on this subject. Second, I believe the limits of the use of a search warrant as an investigative tool to gather evidence, recognized by the United States Supreme Court as required by the Fourth Amendment to the United States Constitution, are worthy of further elaboration, and I do not agree with the Majority's conclusion that the Superior Court improperly substituted its judgment for that of the police in the conduct of an investigation; rather, I conclude that the court was simply performing its proper duty of appellate review.

As the Majority has noted, and as Chief Justice Castille has amplified in his Concurring Opinion, there has been some difference in the language used by the United States Supreme Court and the language used

by our Court to describe the proper standard of review an appellate court must utilize to review a magistrate's determination of probable cause for the issuance of a search warrant. In its decision in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the United States Supreme Court stated that the magistrate's probable cause determination should be paid "great deference by reviewing courts." *Id.* at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)). The Court, however, never explicitly [**35] provided a definition of the concept of "great deference" in either Gates or Spinelli. Although the Spinelli Court cited *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), as the progenitor of the phrase "great deference," *see Spinelli*, 393 U.S. at 419 (citing *Jones* at 270-71), I note that the Jones Court did not use this terminology anywhere in its opinion and, thus, likewise did not provide guidance as to the parameters of its scope. Importantly, though, the Supreme Court in Gates did not view its decision as announcing a new standard of appellate review but, rather, indicated it was merely reaffirming the "traditional standard for review of an issuing magistrate's probable cause determination," which is that a reviewing court should determine whether the facts in the affidavit showed that the magistrate had a "substantial basis for concluding that a search would uncover evidence of wrongdoing." *Gates*, 462 U.S. at 236 (citation and internal quotation marks omitted).

Subsequently, in the case of *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984),

the Court again indicated that a magistrate's determination should be afforded "great deference." However, it also clearly established the limits of this concept by making abundantly plain that a reviewing court was not required to exhibit a degree of deference which would unduly constrain it in the performance of its duty to review the magistrate's actions, holding:

> Deference to the magistrate is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police. A magistrate failing to manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application and who acts instead as an adjunct law enforcement officer cannot provide valid authorization for an otherwise unconstitutional search. Third, reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions

> of others. Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

Leon, 468 U.S. at 914-15 (internal quotation marks, citations and footnote omitted).

Our Court adopted the Gates "substantial basis" test in *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921 (1985), as the standard of review Pennsylvania appellate courts are to use in evaluating a challenge to the sufficiency of probable cause to support the issuance of a search warrant under Article I, Section 8 of the Pennsylvania Constitution; however, we did not, in that case, explicitly hold that a heightened or elevated degree of deference is due a magistrate's legal determination of the existence of probable cause beyond what we normally afford all such legal determinations that we review.[1] Following *Gray*, when discussing the requisite

1. I note that the highest courts of two [**39] of our sister states have concluded that, in the absence of a specific declaration by the United States Supreme Court that a particular standard of appellate review is mandated in order to enforce fundamental rights secured by the United States

(Cont'd)

level of deference to be afforded the magistrate's determination by a reviewing court, our Court has, in the vast majority of our decisions, referred to it as simple "deference," or "due deference." *See Torres*, 564 Pa. at 96, 764 A.2d at 538 ("the reviewing court must accord deference to the issuing authority's probable cause determination"); *Commonwealth v. Baker*, 532 Pa. 121, 127, 615 A.2d 23, 25 (1992) ("[D]eference is to be accorded a magistrate's finding of probable cause"); *Commonwealth v. Jones*, 506 Pa. 262, 270, 484 A.2d 1383, 1387 (1984) (same); *Commonwealth v. Rega*, 593 Pa. 659, 686, 933 A.2d 997, 1013 (2007) ("Due deference will be given to the conclusions of the issuing magistrate."); *Commonwealth v. Rompilla*, 539 Pa. 499, 512, 653 A.2d

(Cont'd)
Constitution, their appellate courts may utilize a more exacting standard of review of claims of violations of federal constitutional rights than that articulated by the United States Supreme Court for such claims. *See, e.g., State v. Navas*, 81 Haw. 113, 913 P.2d 39 (Hawaii 1996) (expressly rejecting the *Gates* standard of review in favor of *de novo* review of a magistrate's determination of probable cause because the Hawaii Constitution provided more extensive protections than the United States Constitution); *State v. Thurman*, 846 P.2d 1256 (Utah 1993) (holding that, because Utah Supreme Court had authority under its state constitution to manage the appellate process and supervisory authority over all state courts, it had power to fashion standards of review and, thus, absent any probation by the United States Supreme Court or by Congress, it was authorized to adopt its own standard of review for questions of federal law, including the voluntariness of consent given for a police search in order to render it lawful under the Fourth Amendment).

626, 632 (1995) (giving due deference to issuing magistrate when conducting review of search warrant affidavit); *Commonwealth v. Moss*, 518 Pa. 337, 344, 543 A.2d 514, 518 (1988) ("Warrant applications must be read in a common sense, non-technical way, 'giving due deference to the conclusions of the issuing magistrate.'" (quoting *Commonwealth v. Council*, 491 Pa. 434, 444, 421 A.2d 623, 628 (1980))).[2]

There have been a few occasions since our decision in Gray, however, where our Court has used language differing from that used in the precedent discussed above. In *Commonwealth v. Weidenmoyer*, 518 Pa. 2, 9, 539 A.2d 1291, 1294 (1988), our Court, citing to Gates, stated that the determination of the issuing authority should be given "great deference," and in Torres, our Court also used the term "substantial deference" after initially articulating the standard of review as simple deference.[3] However, these two isolated references, in and of themselves, do not alter the nearly uniform and consistent articulation by our Court of a standard of ordinary deference for appellate review of a magistrate's determination of probable cause for the issuance of a search warrant.

2. Even though our Court quoted *Council*, which was a pre-*Gates* case, for this proposition, I view this quotation as a reaffirmation of the principle that due deference is what is required to be shown a magistrate's legal conclusion regarding probable cause.

3. *See Torres*, 564 Pa. at 101, 764 A.2d at 540.

Ultimately, I do not view this articulation of a standard of ordinary deference by our Court as contravening the fundamental teachings of Gates which are, as Chief Justice Castille has reminded in his concurring opinion, that the Fourth Amendment expresses a "strong preference for searches conducted pursuant to a warrant," *Gates*, 462 U.S. at 236, and that warrant review is not to be "hypertechnical" but conducted in a "commonsense manner." *Id.* As the United States Supreme Court underscored in *Leon*, in deferring to the magistrate, a reviewing court is not required to relinquish its duty to carefully consider whether a magistrate made the proper legal determination that, under the totality of the factual circumstances as pled in a search warrant affidavit, constitutionally sufficient probable cause existed to issue the warrant. Therefore, no matter how it has been characterized – as ordinary deference, due deference, substantial deference, or great deference — appellate review of the magistrate's legal determination of probable cause, as with appellate review of all legal questions, remains plenary. *See Commonwealth v. Coleman*, 574 Pa. 261, 272, 830 A.2d 554, 560 (2003) ("[S]ince no factual question is involved in a four corners analysis of the sufficiency of a warrant affidavit, the issue is one of law as to which our review is plenary."); *McNeil v. Jordan*, 586 Pa. 413, 427, 894 A.2d 1260, 1268 (2006) ("Our caselaw long has held that questions of law are accorded full appellate review, and our consideration is plenary."); *Guido v. Township of Sandy*, 584 Pa. 93, 101, 880 A.2d 1220, 1225 (2005) (since parties did not dispute facts, the issue presented was a purely legal one and

our court's review was plenary). In conducting this plenary review, an appellate court of this Commonwealth is in no way required to defer to the legal conclusions of the courts below if those conclusions are erroneous. *Commonwealth v. Mistler*, 590 Pa. 390, 396-97, 912 A.2d 1265, 1269 (2006); *Commonwealth v. Millner*, 585 Pa. 237, 247, 888 A.2d 680, 686 (2005). As Chief Justice Castille has aptly stated in his concurring opinion, "When the question is a purely legal one (such as the question of whether an agreed-upon set of facts and circumstances establishes probable cause), there is no jurisprudential reason for a reviewing court to defer to the judgment of any entity below: whether it be the trial judge, a magistrate, or a police officer in the field." Concurring Opinion (C.J. Castille) at 4. Thus, neither our Court nor the Superior Court is compelled to defer to a magistrate's legal conclusion that probable cause existed for the issuance of a warrant if the facts as set forth in the affidavit fail to provide a substantial basis for that conclusion. *See, e.g., Torres*, 564 Pa. at 101, 764 A.2d at 540 (reversing Superior Court because affidavit of probable cause did not set forth a substantial basis to issue a warrant to search defendant's apartment since it contained insufficient facts about the basis of knowledge of the anonymous informants or their veracity in order to establish the reliability of the information they gave to the police).

The Superior Court panel below conducted its appellate review in accordance with the principles of warrant review articulated in Gates and Gray. It examined the totality of the facts as pled in the affidavit,

which was by no means a model of clear draftsmanship, and, accepting them as true, concluded as a matter of law that these facts furnished the magistrate "no basis" to approve the search warrant. See *Commonwealth v. Jones*, 2007 PA Super 181, 928 A.2d 1054, 1058-60 (Pa. Super. 2007) (citing Gray and Gates). The panel's determination of the correctness of the lower court's legal conclusions was its rightful and proper task as a reviewing court. Indeed, our present reversal of the Superior Court is an exercise of that very same function of appellate review, pursuant to our duty under our Commonwealth's Constitution to be the final arbiters in the Pennsylvania Judicial System of such legal determinations. *See Commonwealth v. Pinney*, 474 Pa. 210, 213, 378 A.2d 293, 295 (1977) ("[I]t is this Court's duty to make an independent examination of probable cause, apart from any conclusions drawn by a trial judge or other appellate court, to ensure that the constitutional criteria established to safeguard Fourth Amendment rights have been respected.") Although our Court presently arrives at a different legal conclusion than that reached by the Superior Court, our decision should be construed as nothing more than the simple correction of a legal error by the Superior Court, which we have had occasion to do in the past since reasonable judicial minds can and do differ, at times, on what the law requires under certain circumstances. It should not be considered a departure from the traditional standard of review under which the appellate courts of this

Commonwealth resolve challenges to a magistrate's probable cause determination.

Next, I respectfully disagree with the Majority's assertion that the Superior Court panel "appears to have substituted its judgment for that of the police with respect to the direction of the unfolding investigation." Majority Op. at 16. Although the Majority rightly recognizes that a search warrant may be used as an investigative tool under the appropriate circumstances, I believe the Majority has not given sufficient recognition to the fundamental constitutional limitations attendant to its use for this purpose. As the Majority has noted, Pa.R.Crim.P. 201(3) expressly permits the use of a warrant "to search for and to seize . . . property that constitutes evidence of the commission of a criminal offense." This rule derives from the United States Supreme Court decision in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967).

In Hayden, the Supreme Court reconsidered the question it had addressed in its earlier jurisprudence as to whether the Fourth Amendment permitted the police to search for and seize purely evidentiary materials related to the commission of a crime. Previously, the Court had established a distinction between searches and seizures involving "mere evidence" of a crime as opposed to searches and seizures conducted for the purpose of recovering contraband and the fruits of a crime, having decided that the former was proscribed by the Fourth Amendment while the

latter was permitted.[4] The Hayden Court cast aside this distinction, however, and held "it is reasonable, **within the terms of the** Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals." 387 U.S. at 306 (emphasis added). In arriving at its holding, the Court took care to emphasize the vital purposes served by the Fourth Amendment, which it reminded was

> a reaction to the evils of the use of the general warrant in England and the writs of assistance[5] in the Colonies, and was intended

4. *See Gouled v United States*, 255 U.S. 298, 309, 41 S. Ct. 261, 65 L. Ed. 647 (1921) (holding that a warrant "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . .").

5. The United States Supreme Court previously described these instrumentalities and their attendant deleterious impact on the persons and property of our colonial forebears, thusly:

> The general warrant in which the name of the person to be arrested was left blank, and the writs of assistance [,which gave British customs officials the unlimited authority to search anywhere for goods imported in violation of the Crown's tax laws, *Stanford v Texas*, 379 U.S. 476, 481, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965)], against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on

(Cont'd)

> to protect against invasions of the sanctity of a man's home and the privacies of life from searches under indiscriminate general authority. Protection of these interests was assured by prohibiting all unreasonable searches and seizures, and by requiring the use of warrants, which particularly describe the place to be searched, and the persons or things to be seized, thereby interposing a magistrate between the citizen and the police.

Id. at 301 (internal quotation marks and citation omitted). Thus, the Court mandated that a warrant which authorizes a search for evidence must comport with the same requirements which the Fourth Amendment places on search warrants for the fruits or instrumentalities of crime, or contraband, specifying:

> There must, of course, be a nexus – automatically provided in the case of fruits, instrumentalities or contraband – between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe

(Cont'd)

> suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required.

United States v. Henry, 361 U.S. 98, 100, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959) (footnotes omitted).

> that the evidence sought will aid in a particular apprehension or conviction.

Hayden, 387 U.S. at 307.

The Supreme Court has consequently made quite clear that the Fourth Amendment does not allow warrants of this nature to be used as a general investigative tool permitting the police to *carte blanche* seize any person's private property, papers, or effects in the conduct of a criminal investigation. In order for a magistrate to issue a valid warrant allowing the police to search for and seize evidence of a crime, the police must demonstrate probable cause to the magistrate that the items sought by the warrant have a connection to the crime or crimes under investigation. *See Commonwealth v. Butler*, 448 Pa. 128, 131, 291 A.2d 89, 90 (1972) (applying Hayden to find a nexus between a warrant authorizing the seizure of a suspect's clothing and the crime being investigated, a stabbing, since there was probable cause to believe the suspect's clothing would be covered in blood, inasmuch as the suspect had been identified by a witness as a participant in the stabbing). It is therefore the obligation of a reviewing court to ensure that an affidavit in support of the issuance of such a warrant has furnished a substantial basis for a magistrate to conclude that probable cause of this required nexus exists. The Superior Court's review of the affidavit of probable cause in the case *sub judice* was completely in accordance with this obligation and was not, as the Majority suggests, an

untoward substitution of its judgment for that of the police as to the direction and conduct of an investigation.

My examination of the affidavit of probable cause, in accordance with the principles articulated in *Hayden* and *Butler*, compels me to conclude that the facts pled therein failed to set forth a substantial basis for the magistrate to conclude that there was probable cause of a connection between "pagers, drugs, drug paraphanalia [sic] handguns, bullets," *Jones*, 928 A.2d at 1059, and the crime which the police were investigating—the shooting death of Abdul Sesay. The affidavit is utterly devoid of any facts which would establish a fair probability that Sesay's death was somehow drug-related or that items relating to drug dealing would be found in the dormitory room. Likewise, as the shooting of Sesay took place in a public area, blocks away from the room, the affidavit fails to set forth any facts which would indicate why there was a fair probability that handguns or bullets involved in the shooting could be found within the room. However, as the Majority notes, none of these items was found during the execution of the warrant; thus this deficiency in the affidavit did not, in this instance, necessitate the suppression of any evidence.

By contrast, the affidavit did furnish a substantial basis for the magistrate to conclude that there was probable cause that other evidence identifying Sesay would be found in the room since it set forth factual details regarding the police investigation which established a fair probability that such evidence would

be in the room, namely, the police discovery of his keys to the room, and their confirmation with Widener University security that Sesay was a student there. I therefore agree with the Majority that this identification evidence was necessary to establish the identity of the victim of a murder, which is a fact which the Commonwealth must prove at trial.[6] Hence, since this portion of the affidavit provided probable cause of a nexus between the sought after information and the crime being investigated, the search warrant was valid,[7] and the pieces of evidence the police discovered — Sesay's bloody cell phone and shirt, and Appellee's bloody shorts with Sesay's blood on them — were observed by the police in plain view after their entry into the room, and, consequently, were lawfully seized. See *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (items observed by police while serving a valid search warrant were properly seized since they were in plain view and their incriminating evidentiary nature was immediately apparent); *Commonwealth v. McCree*, 592 Pa. 238, 924 A.2d 621 (2007) (plurality) (although issuing a plurality opinion, the majority of the Court agreed Horton set forth the requirements for seizure of an object without a warrant which is in plain view).

6. *Commonwealth v. Elliott*, 549 Pa. 132, 142 n.10, 700 A.2d 1243, 1248 n.10 (1997).

7. *See, e.g., Commonwealth v. Hernandez*, 594 Pa. 319, 334, 935 A.2d 1275, 1283 (2007) (holding that so long as there is some competent evidence set forth in the search warrant affidavit establishing probable cause the warrant will be considered valid).

It is for these reasons I concur in the result reached by the Majority.

Mr. Justice Saylor joins this concurring opinion.

APPENDIX D — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA FILED JUNE 14, 2007

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2874 EDA 2005

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CURTIS JONES,

Appellant

Appeal from the Judgment of Sentence of September 7, 2005, in the Court of Common Pleas of Delaware County, Criminal Division at No. 1758 02 CR 162 02

BEFORE: JOYCE, KELLY AND COLVILLE*, JJ.

OPINION BY COLVILLE, J.:

FILED JUNE 14, 2007.

This is an appeal from the judgment of sentence imposed following Appellant's convictions of murder in the first degree and robbery. Appellant raises three

* Retired Senior Judge assigned to the Superior Court

issues related to the denial of his motion to suppress: (1) whether the court erred in failing to suppress Appellant's April 16, 2002, statement taken by police and the subsequent fruits thereof in violation of Article 1, § 9 of the Pennsylvania Constitution and the Fifth and Sixth Amendments to the United States Constitution; (2) whether the court erred in failing to suppress physical evidence and other evidence that was the fruit thereof seized by police pursuant to a search warrant signed on April 15, 2002, in violation of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution; and (3) whether the court erred by failing to suppress physical evidence including, but not limited to, clothing belonging to Appellant seized in a search of Appellant's residence pursuant to the April 15, 2002, search warrant which was not identified as items to be searched for and seized in the warrant and for which there is no legal exception in violation of the Pennsylvania rules of court, Article I, § 8 of the Pennsylvania Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. We affirm in part, reverse in part, and remand for a new trial.

We view Appellant's claims with the following consideration:

> Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions

> drawn from those facts are correct. Since the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Jackson, 2006 PA Super 218, 907 A.2d 540, 542 (Pa. Super. 2006).

This case involves the shooting death of the victim in the area of the Widener University campus in Chester, Pennsylvania in the early hours of April 15, 2002. Appellant and the victim were freshman roommates at Widener University. Prior to trial, Appellant filed a motion to suppress statements and physical evidence which the court subsequently denied. Thereafter, following a jury trial, Appellant was found guilty of murder in the first degree and robbery. Appellant was sentenced on the above convictions. This timely appeal followed. The lower court ordered Appellant to file a Pa.R.A.P. 1925(b) statement; Appellant filed a timely statement which included the issues raised on appeal.

First, Appellant claims that statements obtained from him by Detective Nuttall on April 16, 2002, should have been suppressed as they were obtained during a custodial interrogation and Appellant was not given

warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Appellant was interviewed by Detective Nuttall on April 16, 2002, at approximately 6 p.m. At the time of the interview, Officer Nuttall was aware that Appellant had given a statement to the police the previous day, April 15, 2002, indicating that he had been at his dorm room that he shared with the victim on the evening of April 14, 2002, with the victim and several other individuals, that the victim left the room after the other individuals left, that that was the last time Appellant had seen the victim, and Appellant did not know of the victim's whereabouts.

On April 16, 2002, Detective Nuttall contacted Widener University's security department and arranged to speak with all of the individuals who were with the victim the night he disappeared either by having the individuals come to the police station or by the detective going to the university campus. Because Appellant did not have a car, Gary Stulznick from Widener University drove Appellant to the police station. Appellant was interviewed in the detective interview room, a room approximately ten feet by twenty feet with a wall of windows facing the street, the same room in which the other individuals were interviewed. Detective Graves, one of the detectives who interviewed Appellant the previous day, was also present for the interview of Appellant as well as Detective Rodriguez who was in and out of the room during the interview. Detective Nuttall testified that during this time Appellant was not in custody and was free to leave. According to Detective Nuttall, Appellant did not

indicate any desire to have a lawyer present or indicate that he no longer wanted to speak to Detective Nuttall or that he wanted to leave. On April 16, 2002, Appellant provided statements contradicting the statements he gave to the police the previous day. The interview ended with Appellant agreeing to take a polygraph test which was subsequently administered by a different detective.

It is well established that *Miranda* warnings are required only where there is custodial interrogation. *Commonwealth v. Smith*, 575 Pa. 203, 836 A.2d 5, 18 (Pa. 2003). A custodial interrogation occurs when a person is physically deprived of their freedom in any significant way or is placed in a situation in which they reasonably believe their freedom of action or movement is restricted by the interrogation. *Commonwealth v. Eichinger*, 591 Pa. 1, 915 A.2d 1122, 1134-35 (Pa. 2007). The test to determine custodial interrogation does not depend upon the subjective intent of the interrogator, but rather the reasonable belief of the individual being interrogated that their freedom of action is being restricted. *Commonwealth v. Williams*, 539 Pa. 61, 650 A.2d 420, 427 (Pa. 1994). Thus, the fact that the interrogator subjectively believes that the individual being interviewed is a suspect is irrelevant to the question of custody, if the officer has not communicated the fact to the individual. *Smith*, 836 A.2d at 18.

Applying these principles to the facts of this case, we conclude that at the time Appellant made the contradictory statements to Detective Nuttall he was not in custody and, thus, was not required to have

Miranda warnings administered to him. The record indicates Appellant voluntarily came to the police station at the request of the police who asked to speak with everyone who was with the victim the evening of April 14, 2002. Appellant was driven to the police station by an employee of Widener University because he did not have a car. During the interview with Detective Nuttall, Appellant did not indicate that he wanted a lawyer, that he no longer wanted to talk to Detective Nuttall, or that he wanted to leave. Additionally, there is nothing to indicate that Appellant was treated in the interview any differently than the other four individuals who were interviewed. It is clear from the record that the detectives did not place Appellant in a situation where he could have reasonably believed that his freedom of movement was restricted.

Thus, we agree with the conclusion of the lower court that:

> [A]ll of Appellant's statements provided on April 16th were voluntary[ily] given and were provided to the police free from inducement or coercion. There was no reason for Detective Nuttall to provide the *Miranda* warnings to Appellant. Appellant was not considered a suspect on April 16th around 6:00 p.m. Detective Nuttall had no reason to believe any statement that Appellant provided would or could be considered incriminatory in nature; he was merely

> trying to gather evidence as to [v]ictim's whereabouts prior to the murder.

Trial Court Opinion, 6/6/06, at 21-22.

Appellant asserts that even if he had not become a suspect in the homicide, after he made the contradictory statements on April 16, 2002, Appellant had become a suspect on a charge for false statements to police and, therefore, the interrogation should have been stopped for the purpose of providing him with *Miranda* warnings. However, as stated above, under Pennsylvania law, the subjective belief of the interrogator that the individual being interviewed is a suspect is irrelevant to the question of custody if the detective has not communicated the belief to the individual. Appellant does not assert that the detective communicated to him that he was a suspect on a charge for false statements. As we have already concluded, any belief by Appellant that his freedom of action was being restricted at the time that he made the contradictory statements would not be reasonable, thus, Appellant was not subjected to custodial interrogation at that time and *Miranda* warnings were not required.

Appellant further argues that the subsequent statement to the polygraph examiner should have been suppressed as fruit of the unlawful interrogation of Appellant. As we have already determined, Appellant's April 16, 2002, statements to Detective Nuttall were not obtained pursuant to a custodial interrogation for which *Miranda* warnings were required and, thus, the court

correctly concluded that they were not subject to suppression. Accordingly, the subsequent statement to the polygraph examiner is not fruit of an unlawful interrogation as Appellant asserts and the lower court correctly found that this statement was also not subject to suppression.

Appellant's second and third issues relate to the search of Appellant's and the victim's dorm room and the seizure of items from that room. Appellant contends that the search warrant obtained by police was not supported by probable cause and, therefore, the physical evidence taken from the room was seized illegally and should have been suppressed. The lower court determined that there was probable cause upon which the district justice could have issued the search warrant and that any evidence seized pursuant to the search was not subject to suppression. For the following reasons, we find that the lower court erred in this determination.

Appellant asserts that the search and seizure at issue in this case violated both the Pennsylvania Constitution and the United States Constitution. Initially, we note that our courts have held that the standard for evaluating whether probable cause exists for the issuance of a search warrant is the same under both the Fourth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania Constitution. *Commonwealth v. Glass*, 562 Pa. 187, 754 A.2d 655, 661 (Pa. 2000). In *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921 (Pa. 1985), the Pennsylvania

Supreme Court specifically adopted the "totality of the circumstances" test set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), in determining whether probable cause exists for issuing a warrant. *Commonwealth v. Murphy*, 2007 PA Super 14, 916 A.2d 679, 681-82 (Pa. Super. 2007). Pursuant to this standard "[T]he task of the issuing authority is to make a practical, common sense assessment whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Murphy*, 916 A.2d at 682. Further, "A magistrate's finding of probable cause 'must be based on facts described within the four corners of the affidavit[,]' and 'our scope of review of a suppression court's ruling [on a magistrate's finding of probable cause] is confined primarily to questions of law.'" *Commonwealth v. Smith*, 2001 PA Super 284, 784 A.2d 182, 185 (Pa. Super. 2001) (internal citations omitted).

Here the affidavit of probable cause for the search warrant stated as follows:

> On 2/19/2001 [1] Officer Gizzi responded to the area of the 100[0] blk of East 18th St. for a

1. We are aware that the affidavit of probable cause erroneously stated that the criminal act occurred on 2/19/2001, when, in fact, the crime occurred on April 15, 2002, and of Appellant's argument that the warrant lacked probable cause on this basis. The lower court found that although the search warrant contained an error regarding the date of the incident,

(Cont'd)

call of shots fired. Upon arrival the officer was advised by witnesses that the shots were coming from the end of the street, Officer Gizzi then went to the end of the [s]treet and discovered a B/M wearing a black shirt and black jeans shorts laying on his back in a pool of blood with what appeared to be gunshot wounds to the head, the victim was unresponsive and not breathing. Paramedics announced the victim deceased at 0216 Hrs.

Det. Hampel discovered keys on the victim[']s body that belonged to Widener University, [u]pon checking with Widener Security it was found that the victim may have been a

---

(Cont'd)

that error was not fatal to the search warrant. We note that the application for the search warrant indicates the correct date of the criminal act, the district justice who issued the warrant reviewed both the application and the affidavit, and the affidavit contained specific details of the crime. Thus, we do not believe that this technical error results in a finding that the warrant is invalid. *See Commonwealth v. Washington*, 2004 PA Super 362, 858 A.2d 1255, 1257-58 (Pa. Super. 2004) (holding that search warrant executed was valid where despite the technically inaccurate address listed on the warrant, there was no ambiguity about where the criminal activity occurred and no question that probable cause existed to search that location where police had been there previously to make two controlled buys of narcotics; the particularity requirement of Pa.R.Crim.P. 206 was not violated). Instead, as will be discussed later, our finding that the warrant in this case lacked probable cause is based on other reasons.

Appendix D

> [W]idener student, a picture was given to police by Widener Security and was compared to the victim that was discovered on the 1000 blk of East 18th Street, and found that the victim and the picture provided to police were identical.
>
> With the information provided [p]olice believe that the victim is Abdul Sesay B/M/20 who resides [sic] Widener University Campus at Phayer Hall Room # 306[.]

Affidavit of Probable Cause, 4/15/02, at 1.

The application for the search warrant seeks "Any evidence that provides Identification/Cellular Phones, Pagers, Drugs, Drug Paraphanalia [sic], handguns, bullets." Application for Search Warrant, 4/15/02, at 1. Essentially, the affidavit only establishes that the police discovered the victim of an apparent shooting homicide, identified as Abdul Sesay, a Widener University student who resided in a dorm room on campus. As Appellant points out, the affidavit contains no explanation as to why police would expect to find the evidence listed in the warrant in the victim's dormitory room. Nothing in the affidavit states that the victim's death was drug-related, yet some of the evidence sought clearly is so related. Because the affidavit gives no indication that contraband or evidence of a crime will be found in the victim's dorm room blocks away from the crime scene, it is not supported by probable cause.

Moreover, although identification evidence belonging to Abdul Sesay would arguably logically be found in his room, it is clear from the warrant that police had already identified the victim as Abdul Sesay, thus, there was no reason to search for additional identification evidence, certainly there was no stated reason. As such, there is no probable cause to support the issuance of the search warrant for identification purposes.

For these reasons, the issuing authority had no basis upon which to authorize the search of Appellant's and the victim's dorm room and the lower court erred in determining that the warrant was supported by probable cause and failing to suppress the evidence seized from the room.

The lower court further found that even if the search warrant was determined to be invalid, the evidence seized from Appellant's room still would not have been subject to suppression as the detectives obtained valid consent from Appellant to search his dorm room. The Commonwealth makes a cursory argument to the same effect. However, the consent form signed by Appellant giving police permission to search his room was not obtained from Appellant until after the detectives had searched his room and seized the items Appellant sought to suppress. [2] We do not find that subsequent consent

2. The record from the suppression hearing establishes that the search warrant was executed on April 15, 2002, and

(Cont'd)

can operate to validate a completed illegal search and seizure.[3]

The lower court also found that the evidence seized would not have been subject to suppression as the detectives would have inevitably discovered the evidence which Appellant sought to suppress as Appellant and the victim were roommates and the dorm

(Cont'd)

April 16, 2002; the consent to search was signed by Appellant on April 16, 2002, at 11:35 p.m. In fact, counsel for the Commonwealth conceded at the suppression hearing that the detectives searched Appellant's room and seized items, including Appellant's clothing, on April 15, 2002. N.T., 1/29/04, at 43-44; N.T., 5/7/04, at 92-93. This seizure occurred prior to Appellant signing the consent to search form.

3. Neither the Commonwealth or the lower court cite to any authority for the proposition that a subsequent consent to search can validate an initial illegal search, nor have we uncovered any support for such a finding. Instead, although not binding on this Court, we find persuasive certain federal court decisions that have found no justification for an earlier unlawful search based upon a later consent to a search. *See United States v. Melendez-Gonzalez*, 727 F.2d 407, 414 (5th Cir. 1984) (concluding that "There is no authority, however, which justifies an earlier illegal search based upon a later consent to an additional search."); *United States v. Carson*, 793 F.2d 1141, 1153 (10th Cir. 1986) (stating "We agree that voluntary consent to search given after an illegal search, does not transform the prior illegal search into a legal one."). Additionally, because we do not agree that the consent in this case justifies the search and seizure at issue, we need not address the validity of Appellant's consent.

room was a vital part of the ongoing investigation of the homicide. We find the lower court's conclusory statement is not a sufficient basis upon which to justify the court's failure to suppress evidence seized pursuant to the illegal search. The lower court cites to no authority which would support this theory. We note Pennsylvania courts recognize the inevitable discovery doctrine which provides that "evidence which would have been discovered was sufficiently purged of the original illegality to allow admission of the evidence." *Commonwealth v. Ingram*, 2002 PA Super 405, 814 A.2d 264, 272 (Pa. Super. 2002). However, implicit in this doctrine is the fact that the evidence would have been discovered despite the initial illegality. This is not the case with the evidence at issue here. We do not agree that merely because Appellant and the victim were roommates and the dorm room was allegedly a vital part of the ongoing investigation the evidence seized from the room on April 15, 2002, would have inevitably been discovered by detectives. Appellant was not in custody while the illegal search was being conducted and, but for the detectives being in his room unlawfully, Appellant would likely have had access to his room prior to consenting to a search or prior to being taken into custody. Thus, evidence illegally seized from Appellant's room may not have been available to police at a time when a lawful search may have been conducted.

Lastly, we note that because we are reversing the lower court's determination that the warrant was valid and that the evidence seized as a result of the search of Appellant's dorm room was not subject to suppression,

we need not address Appellant's claim that the seizure of evidence from his room, particularly Appellant's clothing, was improper on the basis that the evidence was not identified as items to be searched for and seized in the warrant.

For the above reasons, we affirm the lower court's denial of Appellant's motion to suppress Appellant's April 16, 2002, statements. However, we reverse the lower court's denial of Appellant's motion to suppress evidence seized pursuant to the search warrant issued on April 15, 2002, and remand for a new trial.

Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

s/ [illegible]
Prothonotary

Date: JUN 14 2007

APPENDIX E — OPINION OF THE COURT OF COMMON PLEAS FOR DELAWARE COUNTY, PENNSYLVANIA, CRIMINAL DIVISION DATED JUNE 8, 2004

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA, CRIMINAL DIVISION

NO. 1758-02 & 3838-02

COMMONWEALTH OF PENNSYLVANIA

v

CURTIS RODNEY JONES

Katayoun Copeland, Esquire, for the Commonwealth
Scott DiClaudio, Esquire, for Defendant

ORDER

AND NOW, this 8th day of June 2004, upon consideration Defendant's Omnibus Motions to Suppress Statements and Physical Evidence, the Hearings held on January 28, 2004, January 29, 2004 and May 7, 2004 and the Exhibits entered into evidence CS-1 through CS-3 and CS-5 through CS-8, it is hereby ORDERED AND DECREED that said Motions to Suppress are **DENIED**, it appearing that:

Appendix E

A. Statements made by Defendant on April 15 and April 16

1. Defendant provided several statements on April 15, 2002, April 16, 2002 and April 22, 2002, to Detectives Nuttall and Graves of the Chester City Police Department and to Criminal Investigation Division (CID) Detective Slowik.

2. On April 15, 2002, the statement was given to Detective Nuttall and Detective Graves. The Detectives taped this statement.

3. The April 15, 2002 statement was a result of Detectives questioning Defendant because he was the roommate of the victim. During this statement, Defendant informed the Detectives of the last time he saw the victim and his whereabouts during the homicide.

4. On April 15, 2002, Defendant informs Detectives that he was in his dorm room with the victim and a group of friends and that they were all smoking and drinking. Defendant's statement continues that everyone left and so did the victim and that was the last time he saw the victim.

5. When Defendant gave his statements on April 16, 2002, he had been transported to the Chester Police Station by a member of Widener University's campus security and was placed in an interview room.

6. On April 16, 2002, Defendant was in the Chester City Police Department's Detective Unit when he provided the police with various statements.

7. At the conclusion of the interview on April 16, 2002, the Detective Nuttall asked Defendant if he would take a polygraph test.

8. Defendant agreed to take a polygraph and was brought to the polygraph room located in the office of the Delaware County District Attorney's Office of Criminal Investigation Division where CID Detective Slowik administered the test.

9. Prior to administering the test, Detective Slowik read Defendant his ***Miranda*** rights. Defendant indicated that he understood his rights and was willing to give a statement. *See* Exhibit CS-7.

10. This Court finds that at all relevant times, Defendant was properly advised of and validly waived his ***Miranda*** rights, *See* Exhibit CS-3.

11. This Court also find that at all relevant times, including during the polygraph examination, Defendant indicated that he understood his rights and was willing to answer questions. *See* Exhibit CS-7.

12. This Court finds that all of Defendant's statements were voluntary and free from inducement or coercion and that Defendant never asked for any

attorney during the time in which he provided the statements to police.

13. Furthermore, this Court finds that Defendant did not indicate at any time during the interviews that he wished to invoke his ***Miranda*** rights.

14. This Court finds that Defendant was not under the influence of either marijuana or alcohol or a combination of the two during the interview with the Detectives on April 15, 2002.

15. This Court also finds that Defendant was not under the influence of either marijuana or alcohol or a combination of the two during the interview by Detective Nuttall or Detective Slowik's polygraph examination on April 16, 2002.

16. This Court Finds that Defendant knowingly, intelligently and voluntarily waived his ***Miranda*** rights on April 15, 2002 and on April 16, 2002; therefore, all statements given by Defendant on those dates were not obtained in violation of Defendant's constitutional rights.

B. Statements made by Defendant on April 22, 2002

1. This Court determines that following his arraignment on April 22, 2002 Defendant initiated a conversation with Detective Nuttall that was potentially incriminating in nature. See Exhibit CS-2, at page 8.

2. Detective Nuttall began to inform Defendant of his ***Miranda*** warnings; however, Defendant asked to speak with an attorney and Detective Nuttall informed Defendant that since he requested an attorney he would no longer question Defendant. *See* CS-2 at page 8.

3. Although Defendant was in custody at the time, this Court does not find that he was being interrogated at the time he made the alleged statements to Detective Nuttall since there were no express questions, statements, actions, or conduct on the part of the police that they knew or should have known were reasonably likely to elicit an incriminating response on the part of Defendant.

C. Physical Evidence – Consent

1. Detective Nuttall and Detective Graves obtained valid consent to search Defendant's dorm room, number 306 Phayer Hall, located on the campus of Widener University. *See* Exhibit CS-1.

2. This Court determines that if the Detectives had not obtained the valid consent the Detectives would have inevitably discovered the physical evidence, which Defendant seeks to suppress, since Defendant and the victim were roommates and the dorm room was a vital part of the ongoing investigation regarding the homicide.

Appendix E

D. Physical evidence – Search Warrant

1. During the Suppression Hearing, Detective Rodriguez of the Chester City Police and the affiant for the search warrant testified that the error was the result of human error from cutting and pasting on the computer and that the only error regarding the date occurs on the Affidavit of Probable Cause for the Warrant but that the Application for the Warrant states the correct "date of violation." See Exhibit CS-6.

2. Detective Rodriguez testified that District Justice Davis reviewed both the Application for Search Warrant and the Affidavit of Probable Cause. *See* Exhibits CS-7.

3. This Court finds that although the search warrant contained an error regarding the date of the incident that error is not fatal to the search warrant.

4. Therefore, this Court determines that there was probable cause upon which the District Justice could have issued the search warrant and any evidence seized will not be suppressed.

E. Evidence of Identification

1. Although this issue was raised in his Omnibus Pre-Trial Motion, Defendant did not pursue this issue during any of the Suppression Hearings on this matter; therefore this Court deems this issue waived.

Appendix E

F. Arrest of Defendant without Probable Cause

1. Although this issue was raised in his Omnibus Pre-Trial Motion, Defendant did not pursue this issue during any of the Suppression Hearings on this matter; therefore this Court deems this issue waived.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Motions to Suppress the Statements and Physical Evidence are DENIED. Further Findings and Conclusions may be submitted if the Court writes an Opinion on the appeal of this case.

Defendant is scheduled for Trial on June 28, 2004.

BY THE COURT:

s/ George Koudelis
George Koudelis, J.

APPENDIX F — APPLICATION FOR SEARCH WARRANT AND AUTHORIZATION DATED APRIL 15, 2002

Commonwealth of Pennsylvania

COUNTY OF Delaware

APPLICATION FOR
SEARCH WARRANT
AND AUTHORIZATION

Docket Number (Issuing Authority)	Police Incident Number: 2002-16462	Warrant Control Number: 16452

Det. Rodriguez	Chester Police Dept	610-447-7808	4/15/2002
AFFIANT NAME	AGENCY	PHONE NUMBER	DATE OF APPLICATION

IDENTIFY ITEMS TO BE SEARCHED FOR AND SEIZED (be as specific as possible)
Any evidence that provides Identification/Cellular Phones, Pagers, Drugs, Drug Paraphanalia, handguns, bullets,

SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSON TO BE SEARCHED (Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.)
Building is describe as a large 3 story brick dormitory located in the 700 Blk of East 14th Street. The name of the Building is Prayer Hall, and the room number is 306. the numbers 306 appear above the door frame, and the door is tan in color

NAME OF OWNER OR TENANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED (If known, give name of owner, possessor or occupant)
Widener University

VIOLATION OF (Describe conduct or specify statute)	DATE(S) OF VIOLATION
2501 Homicide,	4/15/2002

☐ *Warrant Application Approved by District Attorney - DA File No.* ____
(DNA approval required per Pa R Crim P. 2007A and assigned file no. per Pa R Crim P. 107)

☐ *Additional Pages Attached (Other than Affidavit of Probable Cause)*

☐ *Probable Cause Affidavit(s) MUST be attached (unless sealed below) Total number of pages:* ____

TOTAL NUMBER OF PAGES IN SUM OF ALL AFFIDAVIT(S) PROBABLE CAUSE AND CONTINUATION PAGES EVEN IF ANY OF THE PAGES ARE SEALED

The below named Affiant, being duly sworn (or affirmed) before the Issuing Authority according to law, deposes and says that there is probable cause to believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure, and is located at the particular premises or in the possession of the particular person as described above.

Det. Rodriguez	Chester Police Department	212
Signature of Affiant	Agency or Address if private Affiant	Badge Number

Sworn to and subscribed before me this 15 day of April 19 02 Mag. Dist. No. 32-1-21

Spencer J. Dunn 10 E. 9th St. Chester, Pa. 19013 (SEAL)
Signature of Issuing Authority Office Address

SEARCH WARRANT
TO LAW ENFORCEMENT OFFICER

WHEREAS, facts have been sworn to or affirmed before me by written affidavit(s) attached hereto from which I have found probable cause, I do authorize you to search the premises or person described and to seize, secure, inventory and make return according to the Pennsylvania Rules of Criminal Procedure.

☒ This Warrant shall be served as soon as practicable and shall be served only between the hours of 6AM to 10PM but in no event later than *

☐ This Warrant shall be served as soon as practicable and may be served any time during the day or night but in no event later than *

1:50 P M. o'clock April 17 20 02

* The issuing authority should specify a date not later than ten (10) days after issuance. Pa R Crim P. 2005(d)

** If the issuing authority finds reasonable cause for issuing a nighttime warrant on the basis of affidavit of reasonable cause set forth in the accompanying affidavit(s) and wishes to issue a nighttime warrant, then this block shall be checked. Pa R Crim P. 2005(d)

Issued under my hand this 15 day of April 19 02 at 1:50 P M. o'clock

Spencer J. Dunn 32-1-21 1-5-04 (SEAL)
Signature of Issuing Authority Mag. Dist. or Judicial Dist. No. Date Commission Expires

Title of Issuing Authority ☒ District Justice ☐ Common Pleas Judge ☐ ____

☐ For good cause stated in the affidavit(s) the Search Warrant Affidavit(s) are sealed for ____ days by my certification and signature. (Pa R Crim P. 2011)

(Date) (SEAL)
Signature of Issuing Authority (Judge of the Court of Common Pleas or Appellate Court Justice or Judge)

TO BE COMPLETED BY ISSUING AUTHORITY

16 11 5/98

15b

Appendix F

Commonwealth of Pennsylvania

COUNTY OF Delaware

AFFIDAVIT OF PROBABLE CAUSE

Docket Number (Issuing Authority)	Police Incident Number 200 1642	Warrant Control Number 1642

PROBABLE CAUSE BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

On 2/19/2001 Officer Gizzi responded to the area of the 100 blk of East 18th St. for a call of shots fired. Upon arrival the officer was advised by witnesses that the shots were coming from the end of the street. Officer Gizzi then went to the end of the Street and discovered a B/M wearing a black shirt and black jeans shorts laying on his back in a pool of blood with what appeared to be gunshot wounds to the head, the victim was unresponsive and not breathing. Paramedics announced the victim deceased at 0216 Hrs.

Det. Hampel discovered keys on the victims' body that belonged to Widener University. Upon checking with Widener Security it was found that the victim may have been a widener student, a picture was given to police by Widener Security and was compared to the victim that was discovered on the 1000 blk of East 18th Street, and found that the victim and the picture provided to police were identical.

With the information provided Police believe that the victim is Abdul Sesay B/M/20 who resides Widener Universaty Campus at Phayer Hall Room #306.

I, THE AFFIANT, BEING DULY SWORN ACCORDING TO LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Affiant Signature	Date	Issuing Authority Signature	Date	(SEAL)
[signature]	4/15/2002	[signature]	4-15-02	

AOPC 1406.10 rev 4/98

No. 09-1407

Supreme Court, U.S.
FILED
JUN 17 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CURTIS JONES,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

G. MICHAEL GREEN
District Attorney

JOHN F.X. REILLY
Deputy District Attorney
Counsel of Record

KATAYOUN COPELAND
Deputy District Attorney

DELAWARE COUNTY DISTRICT ATTORNEY'S OFFICE
Courthouse
201 W. Front St.
Media, PA 19063
(610) 891-4202
reillyjfx@co.delaware.pa.us

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Pennsylvania Supreme Court should have reviewed *de novo* a magistrate's decision to approve a search warrant, an issue not decided by or presented to that Court?

TABLE OF CONTENTS

Page

Table of authorities iii

Opinions below 1

Statement of jurisdiction 1

Counterstatement of the case 1

Argument 5

A. This Court should decline to review the issue raised for the first time in this petition 5

1. The Pennsylvania Supreme Court did not decide the issue of the proper standard of review of a magistrate's decision to approve a search warrant 6

2. The petitioner did not raise the standard-of-review issue in state court 8

3. The issue raised in the petition is not "fairly included" in the question presented 9

B. The Pennsylvania Supreme Court applied the proper, deferential standard of review 10

C. Even applying the *de novo* standard of review suggested by the petitioner, the search warrant contained probable cause 11

Conclusion 12

TABLE OF AUTHORITIES

Page

Cases

Adams v. Robertson, 520 U.S. 83 (1997) 6

Commonwealth v. Jones, ___ Pa. ___, 988 A.2d 649 (2010) 1

Commonwealth v. Jones, 928 A.2d 1054 (Pa.Super.2007) 1

Howell v. Mississippi, 543 U.S. 440 (2005) 9

Illinois v. Gates, 462 U.S. 213 (1983) 5, 7, 8, 10

Ornelas v. United States, 517 U.S. 690 (1996) 10

Warden v. Hayden, 387 U.S. 294 (1967) 4

Webb v. Webb, 451 U.S. 493 (1981) 9

Wood v. Allen, 130 S.Ct. 841 (2010) 10

Statutes

18 Pa.C.S. §2502 1

18 Pa.C.S. §3701 1

28 U.S.C. §1257 1

28 U.S.C. §1257(a) 6

Rules

Pa.R.A.P. §2111(a)(3) 8

Pa.R.A.P. §2112 8

Sup. Ct. Rule 14.1(a) 10

Sup. Ct. Rule 14.1(g)(i) 9

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (Pet. App. 1a-22a) is reported at 988 A.2d 649. The opinion of the Pennsylvania Superior Court (Pet. App. 23a-46a) is published at 928 A.2d 1054. The post-trial opinion of the trial court is not published or included in the petition. The trial court's order (Pet. App. 62a-68a) is not published.

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court entered judgment on February 16, 2010. The petition for a writ of certiorari was filed on May 17, 2010 and docketed on May 19, 2010. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257.

COUNTERSTATEMENT OF THE CASE

Following a jury trial in the Delaware County Court of Common Pleas, the petitioner was convicted of First-Degree Murder in violation of 18 Pa.C.S. §2502 and Robbery in violation of 18 Pa.C.S. §3701. The trial court sentenced the petitioner to life without parole for First-Degree Murder, and a consecutive term of 66 months to 132 months for Robbery. Pet. 3-4; Pet. App. 49a.

The Pennsylvania Superior Court reversed the judgment of sentence and ordered a new trial. Pet.

App. 61a. The Pennsylvania Supreme Court granted the Commonwealth's petition for allowance of appeal, reversed the Superior Court and reinstated the judgment of sentence. Pet. App. 9a-10a, 21a.

* * *

Very early on April 15, 2002, Chester City police officers responded to a report of gunfire near the Widener University campus. The police soon found the victim's dead body, wounded by five gunshots, lying in the street. The police found a set of keys in the victim's clothing that suggested the victim was a Widener student. University security gave police a photograph that appeared to be the victim, Abdul Sesay, a 20-year-old student. The petitioner was the victim's roommate in a university dormitory. Pet. App. 2a-3a.

Later that day, a magisterial district judge issued a search warrant for the dormitory room. The affidavit of probable cause, as reproduced in the Pennsylvania Supreme Court's opinion, stated:

> On 2/19/2001[FN1] Officer Gizzi responded to the area of the 100[0] blk of East 18th St. for a call of shots fired. Upon arrival the officer was advised by witnesses that the shots were coming from the end of the street[.] Officer Gizzi then went to the end of the [s]treet and discovered a B/M wearing a black shirt and black jeans shorts laying [sic] on his back in a pool of blood with what appeared to be gunshot wounds to the head[.] [T]he victim was unresponsive and

not breathing. Paramedics [pro]nounced the victim deceased at 0216 [h]rs.

Det. Hampel discovered keys on the victim[']s body that belonged to Widener University[.] Upon checking with Widener Security it was found that the victim may have been a [W]idener student[.] [A] picture was given to police by Widener Security and was compared to the victim that was discovered on the 1000 blk of East 18th Street, and found [sic] that the victim and the picture provided to police were identical.

With the information provided[, p]olice believe that the victim is Abdul Sesay[,] B/M/20[,] who resides [sic] Widener University Campus at [T]hayer Hall Room # 306[.]

> FN1. The affidavit of probable cause set forth an incorrect investigation date, an error later described as caused by a hasty cut-and-paste procedure. Both the suppression court and the Superior Court determined that this technical mistake had no impact on the validity of the search warrant, a conclusion with which we do not disagree.

Pet. App. 3a-4a. The application for the search warrant sought "Any evidence that provides Identification/ Cellular Phones, Pagers, Drugs, Drug Paraphanalia [sic], handguns, bullets." Pet. App. 4a.

The police executed the search warrant and seized items in plain view, including the victim's cellular telephone, stained with the victim's blood, and items of the petitioner's clothing stained with the victim's blood. Pet. App. 5a.

Before trial, the petitioner moved to suppress the evidence seized with the search warrant. The trial court held a hearing and denied the motion. Pet. App. 7a.

After conviction and sentencing, on direct appeal, the Pennsylvania Superior Court reversed the trial court. The Superior Court concluded that "[b]ecause the affidavit gives no indication that contraband or evidence of a crime will be found in the victim's dorm room blocks away from the crime scene, it is not supported by probable cause." Pet. App. 57a. The Court stated that the warrant lacked probable cause because the police did not need to search for evidence of the victim's identity. Pet. App. 58a.

The Pennsylvania Supreme Court unanimously reversed. The Court concluded there was "no doubt" the warrant contained probable cause to search for evidence of the victim's identity, cellular telephones and pagers. Citing *Warden v. Hayden*, 387 U.S. 294 (1967), the Court determined that the identity of the victim and of those who might have contacted him on the night of his murder was evidence of a crime subject to seizure with a warrant. Pet. App. 15a-16a, 19a-20a. The Pennsylvania Supreme Court emphatically rejected the Superior Court's conclusion that

the police did not need to search for evidence of the victim's identity. Pet. App. 16a-17a, 20a.

ARGUMENT

A. This Court should decline to review the issue raised for the first time in this petition.

The question presented by the petition is a fact-bound determination of whether a search warrant affidavit contained probable cause. The body of the petition presents a different issue: the proper appellate standard of review of a magistrate's decision to approve a search warrant.

The petitioner asks this Court to *not* decide the question presented. Pet. App. 32. Rather, he asks the Court to (1) overrule *Illinois v. Gates*, 462 U.S. 213, 236 (1983); (2) mandate *de novo* review of a magistrate's decision to approve a search warrant; and (3) remand the case to the Pennsylvania Supreme Court. Pet. 16-24, 32.

This Court should deny the petition. The standard-of-review issue was not addressed by or presented to the Pennsylvania Supreme Court. Moreover, even if the petitioner preserved the standard-of-review issue, review is unwarranted because the result would be the same under *de novo* standard suggested by the petitioner.

1. The Pennsylvania Supreme Court did not decide the issue of the proper standard of review of a magistrate's decision to approve a search warrant.

This Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. §1257(a). With very rare exceptions, this Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court. *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

The Pennsylvania Supreme Court stated the standard of review but explicitly declined to further address it. Pet. App. 14a, n. 10. The Court noted that the "nomenclature" used to describe the amount of deference given to the magistrate's determination "is not pertinent to our disposition of the present appeal[,]" and asserted "we will not engage in any further discussion regarding this discrepancy in language or whether such discrepancy is reflective of any practical difference." *Id.* All of the members of the court joined the majority opinion. Pet. App. 22a, 24a, 30a.

Several justices reflected on the standard of review in concurring opinions. The petitioner claims this demonstrates "confusion" and "uncertainty" over the proper standard of review, warranting this

Court's intervention. Pet. 13-16. He is mistaken. The justices' observations are *dicta*.

Chief Justice Castille filed a concurring opinion joined by Justice Baer. He questioned the proper standard of review required by this Court under *Gates*, and offered "[his] own preliminary view" to "guide the bench and bar[.]" Pet. App. 24a-25a. The Chief Justice acknowledged this Court's precedent, questioned why *any* deference should be given to a magistrate's probable cause determination, and, consistent with *Gates*, concluded that deference is necessary to encourage police to obtain warrants. Pet. App. 26a-28a.

Justice Todd filed a concurring opinion joined by Justice Saylor. Justice Todd "offer[ed] . . . a few additional observations" on the proper standard of review. Pet. App. 31a. Justice Todd concluded that the "ordinary deference" standard applied by the Pennsylvania Supreme Court is consistent with this Court's *Gates* standard. Pet. App. 37a.

The justices acknowledged they were offering their personal views. Their speculation in concurring opinions about the ideal standard of review is *dicta*. Moreover, both concurring opinions acknowledge that the Court did not grant allowance of appeal on the question of the proper standard of review. Pet. App. 24a, 31a.

2. The petitioner did not raise the standard-of-review issue in state court.

The petitioner presents a detailed argument for why this Court's precedents and other authorities support a *de novo* standard for reviewing warrants. Pet. 16-24. In his brief in the Pennsylvania Supreme Court, however, the petitioner merely recited the *Gates* standard. It is therefore not surprising that the Court's opinion did not discuss it further.

The Pennsylvania Supreme Court requires a brief to include a statement of "both the scope of review and standard of review[.]" Pennsylvania Rule of Appellate Procedure ("Pa.R.A.P.") §2111(a)(3). The Commonwealth properly stated the *Gates* standard of review in its brief, in both the "Statement of Scope and Standard of Review" and "Argument" sections. Resp. Pa. Brief 3, 17-18.

In his brief, the petitioner did not include a "Counter-Statement of the Scope and Standard of Review." In the argument section, the petitioner agreed that the *Gates* standard of review applied. Pet. Pa. Brief 5, 9-10. The petitioner's failure to challenge the standard of review waived review of the issue by the Pennsylvania Supreme Court. Pa.R.A.P. §2112.

In the Pennsylvania Superior Court, the petitioner, who was the appellant, did not challenge the standard of review. Rather, he simply stated the *Gates* standard. Pet. Pa. Superior Ct. Brief, 18-20. In the trial court, the petitioner did not challenge the standard of review at the suppression hearing or in

his written motion to suppress. N.T. 1/28/04, 6-7, 137, 141; N.T. 5/7/04, 89-90.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb v. Webb*, 451 U.S. 493, 495 (1981) (internal citation omitted). The presentation requirement is jurisdictional. *See Howell v. Mississippi*, 543 U.S. 440, 445-46 (2005). Furthermore, this Court's rules require the petitioner to demonstrate that he properly raised the federal question by showing in the record where and how he raised it. Supreme Court Rule 14.1(g)(i). The petitioner did not meet this obligation because the record shows he did not present the issue below.

The novelty of the standard-of-review issue is also evident in his request that this Court *not* decide the question presented, but rather announce a standard of review more favorable to him and remand the case to the Pennsylvania Supreme Court. Pet. 16-24, 32. If he presented the issue below, the Pennsylvania Supreme Court would have addressed it, and remand would be unnecessary.

3. The issue raised in the petition is not "fairly included" in the question presented.

This Court will only consider the questions set out or "fairly included" in the petition for writ of

certiorari. Supreme Court Rule 14.1(a). The petitioner's standard-of-review issue may be *related* to the question presented – the existence of probable cause – but it is not "fairly included" therein. *See Wood v. Allen*, 130 S.Ct. 841, 851 (2010). Moreover, there is no reason to grant certiorari on a question presented when the petitioner asks this Court not to answer it. Pet. 32.

B. The Pennsylvania Supreme Court applied the proper, deferential standard of review.

A magistrate's probable cause determination should be given "great deference." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). Therefore, a reviewing court is to determine whether the magistrate had a "substantial basis" to conclude the affidavit contained probable cause. *Id. De novo* review is "inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant" because it would discourage police from seeking warrants. *Id.* Deferential appellate review of warrants is well-settled. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

The Pennsylvania Supreme Court properly stated and applied the standard of review. It properly distinguished the plenary review of the trial court's decision to deny the motion to suppress from the deferential *Gates* review of the magistrate's decision to issue the warrant. Pet. App. 10a-14a.

C. Even applying the *de novo* standard of review suggested by the petitioner, the search warrant contained probable cause.

If the petitioner had properly preserved his claim, it would not warrant review because the standard of review would not change the result. Whether reviewed under a deferential or *de novo* standard, the warrant contains probable cause.

The affidavit reports that the police found the victim dead on the street, bleeding from gunshot wounds to the head. The victim had a key in his pocket from a nearby university. University security believed the victim was a student, and gave police a picture. It was a picture of the victim. Based on this information, the police concluded the victim was Abdul Sesay, who lived in Thayer Hall, Room 306. The police sought to search that room for evidence of the victim's identity, and for cellular phones and pagers. Pet. App. 3a-4a.

The Pennsylvania Supreme Court unanimously concluded there was "no doubt" the warrant contained probable cause to search for this evidence to confirm the identity of the victim and determine who contacted the victim on the night of his murder. The Court found "self-evident" the need for conclusive identification of the victim in the early stages of a murder investigation. Pet. App. 16a. This fact-bound, commonsense decision does not merit this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

G Michael Green
District Attorney

John F.X. Reilly
Deputy District Attorney
Counsel of Record

Katayoun Copeland
Deputy District Attorney

Delaware County District
Attorney's Office
Courthouse
201 W. Front St.
Media, PA 19063
(610) 891-4202
reillyjfx@co.delaware.pa.us

June, 2010